Supreme Court, U. S.
FILED
FEB 22 1979
MICHAEL RODAK, JR., CLERK

JOINT APPENDIX

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. MCELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

Jurisdictional Statement Filed November 7, 1978
Probable Jurisdiction noted January 8, 1979

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7882

INDEX

	Page
Chronological list of relevant docket entries	i
Plaintiff's complaint, filed Mar. 28, 1977	1
Answer of Idaho defendants, filed May 23, 1977	29
Order by Fifth Circuit for jurisdiction and venue hearing, filed Apr. 6, 1977	34
[Note: presently located in Juris. Stmt. App. at p. A-167]	
Plaintiff's Exhibit M-1 — Sunshine Mining Co. shares held by brokers, by state	35
Plaintiff's Exhibit M-2 — Sunshine Mining Co. shares held by individuals, by state	36
Plaintiff's Exhibit M-3 — Findings of fact and conclusions of law in Idaho litigation between Sunshine Mining Co. and Great Western United Corp., et al.	37
Plaintiff's Exhibit M-4 — N.Y.S.E. pricing history of Sunshine Mining Co. stock from 12/31/76 through 5/18/77	55
Plaintiff's Exhibit M-5 — Sunshine Mining Co.'s amendment to S.E.C. schedule 14D	57
Plaintiff's Exhibit M-8 — Stephen Metzger's handwritten memo of Mar. 24, 1977, telephone conversation with Melvin Baptie	76
Plaintiff's Exhibit 4 — Idaho comment letter	77
[Note: presently located in Juris. Stmt. App. at A-156 to A-164]	
Plaintiff's Exhibit 5 — Idaho order	86
[Note: presently located in Juris. Stmt. App. at A-165 to A-166]	
Plaintiff's Exhibit 11 — *Wall Street Journal* quotations on Sunshine Mining Co. stock from 3/15/77 to 4/6/77	88
Plaintiff's Exhibit 12 — Comparison of basic requirements of various state takeover laws compiled by Professor Leon Lebowitz	89
Transcript of Mar. 30, 1977, TRO hearing:	
Statements by James P. Kaufman, Assistant Attorney General of Idaho	100
Statements by Peter E. Heiser, Jr., Chief Deputy Attorney General of Idaho	104
Statements by Dickee Howard Goodman, Assistant Attorney General of Maryland	108
Transcript of Apr. 8, 1977, jurisdiction and venue hearing	110
Stipulations	111
Testimony of Milton G. Strom, witness on behalf of plaintiff	
Direct examination	116

Page

Testimony of Norman Polovoy, adverse witness on behalf of plaintiff
Direct examination ... 124
Testimony of James R. Parish, witness on behalf of plaintiff
Direct examination ... 130
Cross examination ... 134
Re-direct examination ... 134
Testimony of John S. Guest, witness on behalf of plaintiff
Direct examination ... 135
Testimony of Leon Lebowitz, witness on behalf of plaintiff
Direct examination ... 151
Testimony of William S. Dugan, witness on behalf of defendant Lefkowitz, New York Attorney General
Direct examination ... 157
Cross examination ... 171
Re-direct examination ... 179
Transcript of trial proceedings ... 180
Testimony of David Wagnon, witness on behalf of plaintiff
Direct examination ... 182
Testimony of Jeffrey B. Bartell, witness on behalf of plaintiff
Direct examination ... 184
Cross examination ... 204
Re-direct examination ... 225
Testimony of G. Michael Boswell, adverse witness on behalf of defendants Kidwell and McEldowney, Idaho officials
Direct examination ... 233
Cross examination ... 241
Testimony of Francis Wheat, witness on behalf of defendants Kidwell and McEldowney, Idaho officials
Direct examination ... 243
Cross examination ... 266
Testimony of William E. Chatlos, witness on behalf of defendants Kidwell and McEldowney, Idaho officials
Direct examination ... 279
Cross examination ... 288
Testimony of Stephen Metzger, witness on behalf of plaintiff 289
Opinion of Court of Appeals, filed Aug. 10, 1978 ... J.S. App. A-1
Opinion of District Court, filed Sep. 2, 1977 ... J.S. App. A-85

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Mar. 28, 1977—Plaintiff Great Western United Corp. filed its complaint with attached exhibits in the United States District Court for the Northern District of Texas, Dallas Division.

Mar. 28, 1977—Summons was issued individually and through the Texas Secretary of State.

Mar. 28, 1977—Plaintiff's order to show cause that the defendants are to appear on Mar. 30, 1977, at 9:00 A.M., filed.

Mar. 29, 1977—Return on summons serving all defendants through Texas Secretary of State filed.

Mar. 30, 1977—Special appearance and motions to dismiss filed by defendant Idaho officials, Kidwell and McEldowney, filed.

Mar. 30, 1977—Return on summons serving personally defendant Maryland officials, Burch and Polovoy, and New York official, Lefkowitz, filed.

Mar. 31, 1977—Temporary restraining order as to all defendants operative until and pending a hearing set April 8, 1977, at 9:00 A.M., filed.

Mar. 31, 1977—Notice of appeal by defendant Maryland officials, Burch and Polovoy, and Idaho officials, Kidwell and McEldowney, filed.

Apr. 6, 1977—Return on summons serving personally defendant Idaho officials, Kidwell and McEldowney, filed.

Apr. 8, 1977—Order from United States Court of Appeals for the Fifth Circuit staying the district court's order of Mar. 31, 1977, pending a hearing before that court on the issues of jurisdiction and venue, with written findings of fact and conclusions of law thereon, prior to consideration of the merits, filed.

Apr. 8, 1977—Defendant Maryland officials, Burch and Polovoy, answer filed.

Apr. 21, 1977—Findings of fact and conclusions of law on jurisdiction and venue issues filed.

May 5, 1977—Order dismissing complaint against defendant Maryland officials, Burch and Polovoy, filed.

May 5, 1977—Order, pursuant to Rule 65(a)(2), F.R.C.P., setting consolidated hearing on application for preliminary injunction with trial of the action on its merits on May 23, 1977, at 9:00 A.M., filed.

May 23, 1977—Defendant Idaho officials, Kidwell and McEldowney, answer filed.

May 23, 1977—Trial of action to the court commenced.

May 24, 1977—Defendant New York official, Lefkowitz, answer filed.

Sep. 2, 1977—Memorandum opinion granting to plaintiff a declaratory judgment and injunctive relief against Defendant Idaho officials, Kidwell and McEldowney, and dismissing the complaint against Defendant New York official, Lefkowitz, filed.

Sep. 6, 1977—Judgment reflecting recitals of memorandum opinion and reiterating dismissals of Defendant New York and Maryland officials filed.

Sep. 7, 1977—Defendant Idaho official, McEldowney, notice of appeal from final judgment and permanent injunction filed.

Sep. 8, 1977—Defendant Idaho official, McEldowney, appeal to the United States Court of Appeals for the Fifth Circuit docketed.

Aug. 10, 1978—Opinion and judgment of United States Court of Appeals for the Fifth Circuit, affirming district court judgment, filed.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 78-759

DAVID H. LEROY, Attorney General of Idaho,
and TOM D. MCELDOWNEY,
Director of the Department of Finance
of the State of Idaho,
Appellants,

vs.

GREAT WESTERN UNITED CORPORATION,
Appellee.

On Appeal from the United States Court of Appeals for the Fifth Circuit

Jurisdictional Statement Filed November 7, 1978
Probable Jurisdiction noted January 8, 1979

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. DA 3-77-0405

Great Western United Corporation,
Plaintiff

vs.

Wayne L. Kidwell,
Attorney General of Idaho
700 West State Street Statehouse
Boise, Idaho 83720

and

Tom D. McEldowney
Director of the Idaho Department of Finance
700 West State Street Statehouse
Boise, Idaho 83720

and

Louis J. Lefkowitz
Attorney General of New York
New York Department of Law
Two World Trade Center
New York, New York 10047

and

Francis B. Burch
Attorney General of Maryland
One South Calvert Street
Baltimore, Maryland 21202

and

Norman Polovoy
Commissioner of Securities
Maryland Division of Securities
One South Calvert Street
Baltimore, Maryland 21202,
Defendants

[Filed Mar. 28, 1977]

COMPLAINT

The Plaintiff, GREAT WESTERN UNITED CORPORATION ("GWU"), alleges as follows:

1. This is an action for a declaratory judgment, pursuant to 28 U.S.C. § 2201, seeking to declare that the provisions of § 30-1501, *et seq.* of the Idaho Code ("Idaho Act"), the provisions of § 11-901, *et seq.* of the Annotated Code of Maryland ("Maryland Act") and the provisions of § 1600, *et seq.* of the New York Business Corporation Law ("New York Act") (collectively, the "State Takeover Acts"), insofar as they purport to apply to an interstate cash tender offer for the purchase of securities traded on a national securities market, (a) represent an unconstitutional burden on interstate commerce in violation of the commerce clause of the United States Constitution (the "Constitution"); (b) intrude unwarrantedly into an area pre-empted by federal regulation, in contravention of the Supremacy Clause of the Constitution; (c) deny rights to equal protection of the law and to due process guaranteed by the Fourteenth Amendment to the Constitution; and (d) deprive civil rights guaranteed by the Constitution and the Civil Rights Act. A temporary restraining order, temporary injunction and permanent injunction are also sought to redress these wrongs by restraining the operation and enforcement of the State Takeover Acts in connection with GWU's proposed tender offer, all on the grounds set forth above.

JURISDICTION AND VENUE

2. Original jurisdiction of this Court is founded upon:

(a) 28 U.S.C. § 1331 in that this is a civil action wherein the matter in controversy exceeds the sum or value of Ten Thousand ($10,000) Dollars, exclusive of interest and costs, and arises under the laws and Constitution of the United States, including the Securities Exchange Act of 1934 and amendments thereto, 15 U.S.C. §§ 78(a) *et seq.*; the Civil Rights Act of 1871, 42 U.S.C. § 1983; Article I § 8 of the Constitution (the "Commerce Clause"); Article VI of the Constitution (the "Supremacy Clause"); and the Fourteenth Amendment to the United States Constitution.

(b) 28 U.S.C. § 1332 in that this is a civil action wherein the matter in controversy exceeds the sum or value of Ten Thousand Dollars ($10,000), exclusive of interest and costs, and is between citizens of different States.

(c) 28 U.S.C. § 1337 in that this is a civil action arising under Acts of Congress regulating commerce or protecting trade and commerce against restraints and monopolies, namely the Securities Exchange Act of 1934 and amendments thereto, 15 U.S.C. §§ 78(a) *et seq.* and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

(d) 28 U.S.C. § 1343(3) and (4) in that this is a civil action seeking redress through declaratory judgment and equitable relief of rights, privileges and

immunities secured by the Constitution and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

(e) 15 U.S.C. Section 78aa (§ 27 of the Securities Exchange Act of 1934) in that this is a civil action claiming the violation of the securities laws of the United States by the enforcement, actual and threatened, of the State Takeover Acts.

3. This Court has personal jurisdiction over all of the Defendants herein under:

(a) Section 27 of the Securities and Exchange Act of 1934 in that Defendants or their duly authorized agents have performed acts within the State of Texas constituting, in whole or in part, the violation of the Federal Securities Laws hereinafter alleged and the transaction of business within the State of Texas.

(b) Article 2031b Tex. Rev. Civ. Stat., each of the Defendants being a non-resident natural person who engages in business in this state, as more specifically hereinafter alleged, but does not maintain a place of regular business in this state or a designated agent upon whom service may be made upon causes of action arising out of such business done in this state and who has, accordingly, been deemed to appoint the Secretary of State of Texas as agent upon whom service of process may be made in this action.

4. Venue is proper in this District pursuant to the provisions of 28 U.S.C. § 1391(b) in that the claims which

are the subject of this Complaint arose in this judicial district and the acts and transactions constituting violations of GWU's rights under the laws and the Constitution have occurred in this judicial district. Alternatively, venue is proper in this judicial district pursuant to the provisions of 28 U.S.C. § 1391(a) in that GWU resides in this judicial district, and the claims which are the subject of this Complaint arose in this judicial district and the acts and transactions constituting violations of GWU's rights under the laws and the Constitution have occurred in this judicial district. Alternatively, venue is proper in this judicial district pursuant to the provisions of Section 27 of the Securities and Exchange Act of 1934, in that acts constituting the violation of Federal Securities Laws have occurred in the State of Texas and Defendants herein transact business in this state.

THE PARTIES AND BACKGROUND

5. GWU is a publicly owned corporation organized and existing under the laws of the State of Delaware with its executive office in Dallas, Texas. GWU is the owner of 335,070 shares of Common Stock, par value $.05 per share (the "Shares"), of Sunshine Mining Company, a Washington corporation ("Sunshine"), which has its principal executive offices at P.O. Box 1080, Kellogg, Idaho 83837.

6. The Chairman of the Board of Directors, the President and Chairman of the Executive Committee, the Executive Vice President, the Vice President and Treasurer and the Controller of GWU are all residents of Dallas County, Texas. All of the members of the Board of Direc-

tors of GWU are residents of Dallas County, Texas. Residents of Dallas County, Texas own in excess of 65% of the outstanding common stock of GWU, and GWU has other Texas shareholders.

7. On March 21, 1977, GWU announced that it intended to make a tender offer to purchase any and all Shares of Sunshine up to 2,000,000 shares (in addition to the 335,070 Shares of Sunshine already owned by GWU) at a net price of $15.75 per share in cash, subject to the terms and condition set forth in a proposed form of an Offer to Purchase and related Letter of Transmittal filed by GWU with the Securities and Exchange Commission (the "Commission") pursuant to 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (the "Williams Act"). GWU is complying with and will continue to comply with all provisions and requirements of the Williams Act dealing with cash tender offers.

8. Defendant, Wayne L. Kidwell, is a citizen of the State of Idaho and is the Attorney General of the State of Idaho.

9. Defendant, Tom D. McEldowney, is a citizen of the State of Idaho and is the Director of the Idaho Department of Finance.

10. The State of Idaho, under the Idaho Act, has purported to grant to Defendant, Tom D. McEldowney, or upon his reference, to Defendant, Wayne L. Kidwell, the right to administer and enforce compliance with the Idaho Act.

11. Defendant, Louis J. Lefkowitz, is a citizen of the State of New York and is the Attorney General of the State of New York.

12. The State of New York, under the New York Act, has purported to grant to Defendant, Louis J. Lefkowitz, the right to administer and enforce the New York Act.

13. Defendant, Francis B. Burch, is a citizen of the State of Maryland and is the Attorney General of the State of Maryland.

14. Defendant, Norman Polovoy, is a citizen of the State of Maryland and is the Commissioner of Securities of the Maryland Division of Securities.

15. The State of Maryland, under the Maryland Act and Section 11-701, *et seq.* of the Annotated Code of Maryland, has purported to give Defendant, Norman Polovoy, the right to administer and enforce compliance with the Maryland Act, and to give to Defendant, Francis B. Burch, the right to institute criminal proceedings under the Maryland Act, with or without a reference from Defendant, Norman Polovoy.

16. The Shares of Sunshine are listed and traded on the New York Stock Exchange and the Spokane Stock Exchange. The following table sets forth the high and low sales prices per share for the periods indicated, as reported in published financial sources (as adjusted for 2% stock dividends in March, 1974 and December, 1976); all prices are New York Stock Exchange sales prices, except that prices commencing January 26, 1976, are shown as Composite Tape transmissions:

Year and Quarter	High	Low
1974		
First Quarter	$24¾	$15½
Second Quarter	20⅛	12⅞
Third Quarter	17⅝	7⅛
Fourth Quarter	13⅛	8½
1975		
First Quarter	14¾	9
Second Quarter	15¾	10¼
Third Quarter	16½	11⅜
Fourth Quarter	12¾	9¼
1976		
First Quarter	13⅛	9¾
Second Quarter	12¾	10½
Third Quarter	12¾	9¾
Fourth Quarter	12½	9½
1977		
First Quarter (through March 17, 1977)	14½	11

The New York Stock Exchange Composite Tape closing price on March 17, 1976, the last trading day prior to public announcement of GWU's intention to make the cash tender offer, was $14.25.

THE WILLIAMS ACT

17. In 1968, Congress enacted certain amendments to the Securities Exchange Act of 1934 to regulate cash tender offers for the securities of corporations registered under Section 12 of that Act. Sunshine is registered under Section 12 of that Act.

18. The Williams Act established a uniform national system of regulation of interstate cash tender offers, administered by a single Federal Agency, the Commission. In enacting the Williams Act, Congress recognized that cash tender offers serve a legitimate and beneficial economic function, providing investors with an effective method of replacing inefficient but entrenched management and, also, with an opportunity to sell their shares at a price in excess of the prevailing market price. The Williams Act reflects the intent of Congress not to defeat or discourage cash tender offers.

19. The Williams Act is designed to establish even-handed regulation, favoring neither the tender offeror nor incumbent management of the target corporation, but assuring that investors are provided with certain material information in connection with the tender offer to enable them to render an informed investment judgment as to whether to hold, sell or tender their securities.

STATE TAKEOVER ACTS MATERIALLY CONFLICT WITH EACH OTHER AND WITH THE WILLIAMS ACT

20. Attached hereto as Exhibit "A" and made a part hereof is a chart which demonstrates certain of the material conflicts among the State Takeover Acts themselves, as well as conflicts with the Williams Act. Section 28 of the Securities Exchange Act of 1934, of which the Williams Act is a part, tolerates the jurisdiction of a state securities commission, or like agency, only insofar as their is no conflict with that Act or the rules and regulations thereunder.

IDAHO ADMINISTRATIVE PROCEEDINGS

21. Although not legally required to do so, but in a spirit of cooperation, GWU, on March 21, 1977, delivered an application for registration under the Idaho Act. On March 25, 1977, Defendant, Tom D. McEldowney, responded by telecopied letter as set forth on Exhibit "B" attached hereto and made a part hereof. The demands made in such letter are unreasonable, unnecessary and violative of the federal scheme of regulation under the Williams Act.

22. On March 25, 1977, Defendant, Tom D. McEldowney, with no notice to GWU and without hearing, so far as is known to GWU, issued an "Order" that certain material information had been found to be lacking in the application for registration and proposed form of Offer to Purchase filed under the Idaho Act by GWU, and "ordered" that the effective date of the offer be delayed. A copy of said ex parte "Order" is attached hereto and made a part hereof as Exhibit "C".

23. The Idaho "Order" requires GWU, as a prerequisite to making its proposed cash tender offer, to alter the terms of that offer, in ways which are unreasonable, unnecessary, impossible, or involve a risk of violating the Williams Act, and presage further delay and the burden and expense of additional Idaho administrative procedures in which incumbent management of the Company will undoubtedly participate, all without any assurance that the offer will ever be permitted to be made under the Idaho Act.

MARYLAND ADMINISTRATIVE PROCEEDINGS

24. Although not legally required to do so, but in a spirit of cooperation, representatives of GWU met with Defendant, Norman Polovoy, on March 21, 1977, in an effort to demonstrate that the Maryland Act was inapplicable in any event for the reason that Sunshine does not have its primary place of business or a substantial portion of its assets in Maryland. On information and belief, Defendant, Norman Polovoy thereafter contacted or was contacted by representatives of incumbent management of Sunshine, and thereafter advised GWU counsel that the Maryland Defendants would call a hearing in order to determine applicability of the Maryland Act.

NEW YORK ADMINISTRATIVE PROCEEDINGS

25. Although not legally required to do so, but in a spirit of cooperation, representatives of GWU met with representatives of Defendant, Louis J. Lefkowitz, on March 21, 1977, in an effort to demonstrate that the New York Act was inapplicable in any event for the reason that Sunshine does not have its principal place of business and substantial assets within New York. Representatives of Defendant, Louis J. Lefkowitz, thereafter advised representatives of GWU that the New York Defendant was also asserting jurisdiction over GWU's proposed cash tender offer.

IRREPARABLE INJURY

26. The enforcement of the State Takeover Acts and the Idaho "Order", is causing and, unless enjoined, will continue to cause immediate, serious and irreparable injury, both to GWU and its shareholders, which injury is not capable of

exact calculation and for which there is no adequate remedy of law, in that GWU will be deprived of its right under the Williams Act to make its proposed cash tender offer at a premium above the market price to shareholders of Sunshine throughout the country.

27. The very existence of the State Takeover Acts and the Idaho "Order", has had and, unless enjoined, will continue to have a chilling effect upon the exercise of rights of prospective tender offerors throughout the country to make interstate cash tender offers to shareholders throughout the country for the purpose of securities of corporations traded on national securities markets, in violation of the Constitution and the Williams Act.

28. The enforcement of the State Takeover Acts and the Idaho "Order", has already inflicted serious injury on GWU, GWU's shareholders, and shareholders of Sunshine. GWU's compliance with the State Takeover Acts will result in unnecessary, unreasonable and indefinite delay of GWU's proposed cash tender offer, as well as the expenditure of substantial time, money and effort by GWU and its representatives. GWU's inability to make its cash tender offer at the time of its choosing, the consequent delay in the making of the offer and the nature of the conditions already imposed upon the offer by the Idaho "Order" and undoubtedly to be imposed upon the offer by state officials seeking to enforce the New York Act and the Maryland Act have and will continue to seriously jeopardize the making of the offer and, if ultimately made, its prospects for success. Absent prompt and decisive action by this Court enjoining the enforcement here of the State Takeover Acts and the Idaho

"Order", the proposed tender offer may never be made and thus, GWU, GWU's shareholders and shareholders of Sunshine will be irreparably injured. GWU has no adequate remedy at law.

29. Existing and continued action under color of state law by Defendants is depriving and will deprive GWU of the rights, privileges and immunities secured by the Supremacy Clause and Commerce Clause of the Constitution, the right of due process and equal protection under the law afforded by the Fourteenth Amendment thereto, and 42 U.S.C. § 1983.

30. The reasonably foreseeable, contemplated and intended consequences caused by Defendants' actions and threatened action as hereinabove set forth will be an adverse impact and restraint on the commerce of the State of Texas. Material economic injury to GWU and other citizens of the State of Texas will arise from said actions.

CLAIMS FOR RELIEF

31. GWU repeats and realleges the allegations of Paragraphs 5 through 30 above.

32. The operation and enforcement by Defendants of the State Takeover Acts expose GWU to:

(a) multiplicity of conflicting regulatory schemes, pre-filing and filing requirements, hearings and litigation;

(b) incalculable expense and undue delay;

(c) administrative orders issued without notice or hearing, as exemplified by the Idaho "Order";

(d) a violation of one State Takeover Act by compliance with another;

(e) inconsistent results from State to State;

(f) violation of the Williams Act by compliance with conflicting State law;

(g) asserted extra-territorial application of each State Takeover Act, even if no shareholders of Sunshine reside in Idaho, New York or Maryland, where, in any event, the interest of shareholders in connection with tender offers for their securities are fully and adequately protected by the extensive provisions of the Williams Act, other provisions of the Federal Securities Laws, the rules and regulations promulgated pursuant thereto, and the existing "Blue Sky" laws of the States in which such shareholders reside; and

(h) three regulatory schemes so one-sided and pro-management (rather than pro-shareholder) that only incumbent management of Sunshine can elect not to have the provisions of the State Takeover Acts apply.

The Congressional encouragement of tender offers is totally frustrated. The uniformity of regulation under the Williams Act is rendered impossible. By reason of the foregoing, the State Takeover Acts, on their face and as applied, impose a direct, substantial and unreasonable burden upon interstate commerce in violation of the Commerce Clause of the Constitution, a violation of GWU's civil rights, and a denial to GWU of the equal protection rights under the law and the right of due process of law under the Fourteenth Amendment to the Constitution.

33. GWU repeats and realleges the allegations of Paragraphs 5 through 30 and 32 above.

34. The State Takeover Acts, on their face and as applied, are:

(a) incompatible with the dominant Federal interest in, and uniform Federal regulation of, interstate cash tender offers and contravene the purpose, spirit and provisions of the Williams Act and the rules and regulations promulgated pursuant thereto;

(b) tip in favor of incumbent management the delicate balance of regulation, favoring neither the tender offeror nor incumbent management, carefully established by Congress in the Williams Act and maintained by the Commission in its rules and regulations pursuant thereto;

(c) provide, contrary to the Federal regulatory scheme, benefits to incumbent management and prejudice to the offeror;

(d) restrict the conduct of the offeror before and during the tender offer, but not the conduct of incumbent management;

(e) require an offeror to announce its intention to make a tender offer and to file information in advance of making the offer, despite the fact that Congress expressly rejected such a requirement in enacting the Williams Act;

(f) require disclosure by an offeror of burdensome and unnecessary information without requiring equiva-

lent disclosure by incumbent management in opposition to the tender offer;

(g) permit incumbent management or the Defendants to delay and defeat a tender offer by subjecting the offeror, before making the offer, or during the making of an offer, to lengthy and burdensome hearings, not required or permitted by the Federal regulatory scheme;

(h) prevent a tender offer from being made to any shareholder anywhere in the country unless and until incumbent management or Defendants approve the offer; prohibit or impede the making of a tender offer permissible under the Federal regulatory scheme; make possible simultaneous but inconsistent regulation of a tender offer by different States; alter the duration, proration and withdrawal provisions of a tender offer as prescribed by Federal law, rules and regulations, and require disclosure of information by the offeror in a form and manner in violation of the Federal regulatory scheme; and

(i) impose conditions on the making of a tender offer which are impossible to fulfill and, thus, preclude the making of the offer, in contravention of the Federal regulatory scheme.

By reason of the foregoing, the State Takeover Acts, on their face and as applied, are pre-empted by Federal law, are in conflict with the Federal regulatory scheme, contravene Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), and violate the Supremacy Clause of the Constitution.

WHEREFORE, GWU prays that:

A. This Court declare that the State Takeover Acts are unconstitutional and null and void as applied to GWU's interstate cash tender offer for Sunshine Shares.

B. This Court order that Defendants, their successors in office, their agents, servants, employees and attorneys, and all persons in active concert or participation with them, be temporarily, preliminarily and permanently enjoined from taking any action to enforce the State Takeover Acts or any other provision of State law incorporated by reference therein, or any other orders, rules or regulations issued pursuant thereto, as against GWU or those acting in its behalf, in connection with GWU's interstate cash tender offer for Sunshine Shares.

C. GWU have such other and further relief as the Court shall deemed necessary and proper.

Ivan Irwin, Jr.
A.B. Conant, Jr.
James V. Grevelle
James Wm. Moore

/s/ A.B. CONANT, JR.
2827 First National Bank Building
Dallas, Texas 75202
(214) 748-9696

OF COUNSEL:
SHANK, IRWIN, CONANT, WILLIAMSON & GREVELLE

STATE OF TEXAS
COUNTY OF DALLAS

G. MICHAEL BOSWELL, being duly sworn, deposes and says that he is the Executive Vice President of GREAT WESTERN UNITED CORPORATION, the Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof and that the same are true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

/s/ G. MICHAEL BOSWELL

SUBSCRIBED AND SWORN to before me this 27th day of March, 1977.

/s/ DIANNA FOX
Notary Public in and for
Dallas County, Texas

MATERIAL CONFLICTS ANALYSIS*

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
1. Definition of "Target Company."	Any issuer with a class of equity securities registered under the Securities Exchange Act of 1934. § 14(d)(1).	A corporation or other issuer of securities which is organized under the laws of the State of Idaho or has its principal office in the state, which has substantial assets located in the state, whose equity securities of any class are or have been registered under Chapter 14, Title 30, Idaho Code, or predecessor laws or § 12 of the Securities Exchange Act of 1934, and which is or may be involved in a takeover offer relating to any class of its equity securities. § 30-1501(6).	A corporation or other issuer of securities whose equity securities are or are to be the subject of a takeover offer and which (1) is organized under the laws of the State of Maryland, or (2) has its primary place of business or a substantial portion of its assets in the state. § 11-901(i).	A corporation whose securities are or are to be the subject of a takeover bid and is either organized under the laws of the State of New York or has its principal place of business *and* substantial assets within the State of New York. § 1601(a) and (e).
2. Waiting period.	None (Rejected by Congress)	No specific number of days, but a registration statement must be declared effective by the director of the department of finance before the offer may commence. In addition, he may by order summarily delay	Automatic 20-day waiting period after the date of filing of a registration statement. § 11-902.	Automatic 20-day waiting period after the date of filing of a registration statement. § 1602.

*Reference is here made to complete text of laws under consideration; the information to follow is only a summary of certain points.

[Exhibit A to Complaint]

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
		the effective date of the offer if he determines that the registration statement does not contain all of the specified information or does not provide full disclosure to offerees of all material information concerning the offer. § 30-1503(3) and (4).		
3. Information required in filings.	(1) The background and identity of all persons by whom or on whose behalf the purchases have been or are to be effected; (2) The source and amount of the funds or other consideration used or to be used in making the purchases, and information on funds borrowed for the purchase price. (3) If the purpose of the offer is to acquire control, any plans or proposals to liquidate, to sell assets, to merge, or to make any other major change.	Substantially the same information required by the Williams Act, *plus* the following: (1) material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, (2) a description of each class of its stock and long-term debt, (3) a description of the business done by the offeror and its subsidiaries and any material changes therein during the past 3 years,	Substantially the same information required by the Williams Act, *plus* the following: (1) The number of shares to be purchased, (2) The duration of the offer, (3) Whether the offeror will unconditionally accept all or any part of the shares tendered,	Substantially the same information required by the Williams Act, *plus* the following: (1) Complete information on the organization and operations of the offeror, including without limitation the year of organization, form of organization, jurisdiction in which it is organized, (2) a description of each class of the offeror's capital stock and of its long-term debt, (3) financial statements for the current period and for the 3 most recent annual accounting periods,
	(4) Shares owned and acquirable; and	(4) a description of the location and character of the principal properties of the offeror and its subsidiaries,	(4) The conditions upon which acceptance will be made,	(4) a description of pending legal proceedings other than routine litigation to which the offeror or any of its subsidiaries is a party or of which any of their properties is subject,
	(5) Detailed information as to contracts, arrangements, or understandings with any person with respect to any securities of the issuer. § 13(d)(1).	(5) a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party, (6) the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past 3 years, (7) financial statements of the offeror for its 3 most recent annual accounting periods and any current period, and (8) any other documents, exhibits and information that the director deems material to the takeover offer. § 30-1503.	(5) The other contractual terms of the offer. § 11-902.	(5) a brief description of the business done by the offeror and its subsidiaries and the general development of such business over the past 5 years, (6) the names of all directors and executive officers together with biographical summaries of each for the preceding 3 years and (7) such other and further exhibits, data and documents, as may be required by the Attorney General. § 1603.
4. Publication.	None. (However, publication of definitive offer needed if shareholder	The statute *requires* public disclosure of the material terms of the	An offeror *may* subsequent to filing publish a notice of intention to	No comparable provision.

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
	list unavailable).	proposed offer not later than the date of filing of the registration statement. § 30-1503. The advertisement required by the regulations is to state the following information: (1) The name of the offeror, (2) The name of the target company, (3) The class of security for which a takeover offer is intended to be made, (4) The amount and nature of the consideration, including cash, stock, or other securities or property to be used by the offeror to acquire tendered shares of the target company. (5) If the consideration is to be a security and if there is a public market for such security, the name of the principal national securities exchange or other market where the price of the	make a takeover offer containing a full and fair summary of the information required to be filed. § 11-902(c). The notice of intention must contain a legend, prominently displayed on the notice, stating that an offer may not be made, and tenders are not being and may not be solicitated, until the expiration of a twenty-day waiting period, and specifying the date on which offers may first be made. § 11-902(c).	

22

		security is quoted and the last reported price at the close of trading on a business day not more than three (3) days prior to the date when public disclosure is made, (6) The date of filing of the registration statement with the director, and (7) The following statement in bold-faced type: "THIS PUBLICATION OF A PROPOSED TENDER OFFER OR INVITATION FOR TENDERS IS REQUIRED BY THE IDAHO CORPORATE TAKE-OVER LAW AND DOES NOT CONSTITUTE AN OFFER NOR A SOLICITATION FOR AN OFFER. NO OFFER MAY BE MADE, NOR WILL TENDERS BE ACCEPTED, UNLESS AND UNTIL THE REGISTRATION STATEMENT WITH RESPECT TO THE OFFER BECOMES EFFECTIVE WITH THE DIRECTOR OF		

23

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
		FINANCE." *Regulations*, "Definitions (6)". The director may permit the omission of any of the above information or the inclusion of additional information in a public disclosure.		
5. Advance administrative review.	None.	(a) A takeover offer becomes effective only when approved by the director of the department of finance who may call a hearing if he deems it necessary or appropriate and *shall* call a hearing for the protection of offerees in Idaho if requested by the target company acting through its board of directors. If a hearing is called, the offer shall not become effective until registered by order of the director. Any hearing called by the director shall be held within 20 days of the date of filing and any determination must be made following the hearing within 30 days after the date of such filing, unless extended by order of the director. Following the hearing, if the director finds that the takeover offer fails to provide for full disclosure to offerees of all material information concerning the offer or will not be made to all stockholders on substantially equal terms or is in violation of the Idaho blue sky law, he shall by order deny registration of the offer. § 30-150,	(a) The securities commissioner has the power to make public or private investigations concerning violations or enforcement of the statute, and may seek court injunctions for violations or potential violations of the statute. §§ 11-701, 11-702 and 11-906.	(a) The Attorney General of the State of New York may within 15 days of the filing of the registration statement, schedule a public hearing or conduct such investigation as he deems necessary concerning the proposed offer for the purpose of determining compliance with the requirements of the statute and whether the offer provides full and fair disclosure to offerees of all material information concerning the offer including the filing of a complete and accurate registration statement. Any initial hearings shall commence within 40 days of the filing of the registration statement. § 1604. Within 30 days of such hearing or investigation, the Attorney General shall determine whether the requirements of the statute have been met. If he so finds, he shall enter an order authorizing the making or continuation of the offer. If he finds to the contrary, he shall enter an order prohibiting the making or continuation of the offer until such time as full compliance has been accomplished. § 1605.
		(The director takes the position that "filing" is complete and "filed" only after the offeror has incorporated all of the director's comments into the offering material.)		
		(b) No advance administrative review of target company's material.	(b) Same as Idaho.	(b) Same as Idaho.
6. Filing requirements of incumbent management.	Any solicitation or recommendation to security holders to accept or reject the tender offer must be made in accordance with rules prescribed by the SEC. § 14(d)(4). The regulations require that an information statement on Schedule 14D must be	Same as Maryland. In addition, the director by rule or order may prohibit the use of any solicitation materials deemed false or misleading. § 30-1504.	No advance filing requirement. Copies of all materials used by the target company must be filed with the commissioner not later than the time they are first used and are subject to general anti-fraud provisions. § 11-903.	Substantially the same as Maryland. Regulations, §§ 12.10.

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
	filed with the SEC prior to taking any such action. Regulation 14d-4. The information required by the Schedule 14D includes the following: (1) The title and class of the securities in question and the name and address of the issuer. (2) An identification of the tender offer and a statement of the reasons for the solicitation or recommendation to security holders to accept or reject the offer. (3) The name and business address of the person filing the statement. (4) A description of any arrangement or understanding in regard to the solicitation with (i) the issuer or the management of the issuer or (ii) the offeror. (5) Identification of any person or class of persons employed, retained or to be compensated to make			

	solicitations or recommendations to security holders and a brief description of the terms of such employment, retainer or arrangement for compensation. (6) A copy of all solicitations or recommendations to accept or reject the tender offer. (7) Information as to all transactions in the securities which are the subject of the tender offer which were effected during the past 60 days by the issuer and its subsidiaries and their officers, directors, and affiliated persons. Any written solicitation or recommendation to security holders must include the name of the person making the solicitation or recommendation and the information required by items 2 and 4 above or a fair and adequate summary thereof. Regulation 14d-4.			

Item:	Williams Act	Idaho Act	Maryland Act	New York Act
7. Exemption from regulation if offer is recommended by incumbent management.	None.	Takeover offer does not include an offer as to which the target company, acting through its Board of Directors, recommends acceptance to its stockholders, if the offer is made to all stockholders on substantially equal terms. § 30-1501(5)(e).	Same as Idaho, if any inducements to officers and directors of the company are disclosed to all offerees at the time the takeover is made. § 11-901(h)(2)(v).	Substantially the same as Maryland. § 1601(b)(5).
8. Extra-territorial effect of statute.	At least nationwide.	At least nationwide. Offers must be made to all Idaho stockholders on substantially the same terms made to non-Idaho stockholders. § 30-1506	Same as Idaho. § 11-905(a).	Substantially the same as Idaho by regulation. Regulations, § 12.4(b) and (f).

NOTE: Exhibits "B" and "C" to Complaint reproduced elsewhere in this Appendix as Plaintiff's Exhibits 4 and 5, respectively.

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405-D

[Title Omitted in Printing]

[Filed May 23, 1977]

ANSWER OF IDAHO DEFENDANTS

Defendants Wayne L. Kidwell, Attorney General, State of Idaho, and Tom D. McEldowney, Director, Department of Finance, State of Idaho, answer the Complaint as follows:

First Defense

This Court lacks jurisdiction over the subject matter of this action.

Second Defense

This Court lacks jurisdiction over the person of the defendants.

Third Defense

Venue is not proper in this judicial district.

Fourth Defense

There is insufficiency of process.

Fifth Defense

The Complaint fails to state a claim against defendants upon which relief can be granted.

Sixth Defense

Plaintiff waived its right to challenge the constitutional validity of the Idaho statute as applied to the proposed tender offer which is the subject of the Complaint, by expressly stating in the proposed offer that compliance with the statute was a condition thereof, by announcing and stating in its filing with the Securities and Exchange Commission its intent to comply with the statute, and by its filing in Idaho.

Seventh Defense

1. Admit that plaintiff seeks relief as alleged, and deny all other allegations in Paragraph 1 of the Complaint.

2. Deny the allegations in Paragraphs 2, 3 and 4 of the Complaint.

3. Deny the allegations in Paragraphs 5 and 6 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

4. Admit the allegations in the first sentence of Paragraph 7 of the Complaint, and deny the other allegations in that paragraph for lack of knowledge or information sufficient to form a belief as to the truth thereof.

5. Admit the allegations in Paragraphs 8 and 9 of the Complaint.

6. Admit and aver that the Idaho Act assigns the duty to administer and enforce the law to the Director of the Department of Finance, with the Attorney General of the State of Idaho acting as his attorney; and except as hereinabove admitted, deny the allegations in Paragraph 10 of the Complaint.

7. Admit the allegations in Paragraph 11 of the Complaint.

8. Deny the allegations in Paragraph 12 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

9. Admit the allegations in Paragraphs 13 and 14 of the Complaint.

10. Deny the allegations in Paragraphs 15 and 16 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

11. Admit the allegations in Paragraph 17 of the Complaint.

12. Admit that the Williams Act was duly enacted and contains certain provisions; and except as hereinabove admitted, deny the allegations in Paragraph 18 of the Complaint.

13. Deny the allegations in Paragraph 19 of the Complaint.

14. Admit that there is attached to the Complaint as Exhibit "A" a chart, and admit and aver that the federal law does not preempt state law as long as there is no actual and direct conflict between the two; and except as hereinabove admitted, deny the allegations in Paragraph 20 of the Complaint.

15. Admit that plaintiff on March 21, 1977, delivered an application for registration under the Idaho Act, and that on March 25, 1977, defendant Tom D. McEldowney, by and through his Deputy Administrator, Melvin J. Baptie, responded to plaintiff's filing by telecopy letter as

set out in Exhibit "B" to the Complaint; and except as hereinabove admitted, deny the allegations in Paragraph 21 of the Complaint.

16. Admit the allegations in Paragraph 22 of the Complaint, and aver that defendant McEldowney had no obligation to give plaintiff prior notice or hearing and that defendant McEldowney on March 25, 1977, a Friday, voluntarily transmitted to plaintiff the order and accompanying letter by telecopier.

17. Deny the allegations in Paragraph 23 of the Complaint.

18. Deny the allegations in Paragraphs 24 and 25 of the Complaint for lack of knowledge or information sufficient to form a belief as to the truth thereof.

19. Deny the allegations in Paragraphs 26, 27, 28, 29, 30, 32 and 34 of the Complaint.

WHEREFORE, said defendants pray that the action be dismissed, and for such other and further relief as the Court shall deem necessary and proper.

PETER E. HEISER, JR.
Chief Deputy Attorney General
Office of the Attorney General
State of Idaho
Boise, Idaho 83720
(208) 384-2400

JAMES P. KAUFMAN
Assistant Attorney General
Office of the Attorney General
State of Idaho
Boise, Idaho 83720
(208) 384-3313

JONES, DAY, REAVIS & POGUE
ELLIS H. McKAY
1801 Century Park East
Los Angeles, California 90067
(213) 553-3939

WILLIAM E. STEINBRINK
ROBERT A. PROFUSEK
1700 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939
Special Counsel

By _____
James P. Kaufman

[Certificate of Service Omitted in Printing]

In the United States Court of Appeals
for the Fifth Circuit

No. 77-1677

Great Western United Corporation,
Plaintiff-Appellee,

vs.

Wayne L. Kidwell, Attorney General of Idaho, and Tom D. McEldowney, Director of the Idaho Dept. of Finance,
Defendants-Appellants,

Louis J. Lefkowitz, Attorney General of New York, et al.,
Defendants.

[Filed Apr. 6, 1977]

Appeal from the United States District Court for the Northern District of Texas

Before COLEMAN, GODBOLD and CLARK, Circuit Judges.

BY THE COURT:

The order of the district court entered March 31, 1977, is stayed pending further proceedings in the district court.

The district court is directed to consider the issues of jurisdiction and venue and enter findings of fact and conclusions of law thereon before consideration of the merits. This proceeding involves novel and difficult issues which have broad impact upon federalism. Therefore, should the district court determine that it has jurisdiction and venue,

it should consider certification of this determination under 28 U.S.C. § 1292(b) before trial on the merits.

Motions for clarification and for rehearing are DENIED.

Page 1

PLAINTIFF'S EXHIBIT M-1:

Sunshine Mining Co. shares
held by brokers, by state.

State	0-99	100-199	200-499	500-1000	1000+ Over	All	Total Shares
ARIZONA	1	1	0	2	2	6	5673
CALIFORNIA	10	3	9	2	7	31	98268
COLORADO	1	1	0	0	0	2	122
CONNECTICUT	4	2	2	0	1	9	2297
WASHINGTON, D.C.	0	0	0	1	1	2	1702
FLORIDA	2	3	5	1	1	12	5698
GEORGIA	2	0	1	0	1	4	2452
HAWAII	2	0	0	0	0	2	30
IOWA	2	1	1	0	0	4	435
IDAHO	1	0	1	2	0	4	1713
ILLINOIS	4	3	5	1	2	15	49576
INDIANA	3	1	0	0	0	4	138
KANSAS	1	0	1	0	0	2	205
KENTUCKY	0	0	1	1	1	3	2527
MASSACHUSETTS	6	2	5	3	9	25	239669
MARYLAND	2	0	3	0	1	6	4206
MICHIGAN	0	2	3	2	2	9	4917
MINNESOTA	1	0	1	2	0	4	1404
MISSOURI	3	2	2	0	3	10	13195
MONTANA	0	1	0	1	0	2	716
NORTH DAKOTA	0	0	0	0	1	1	1446
NEW HAMPSHIRE	0	0	0	1	0	1	826
NEW JERSEY	2	0	2	1	3	8	19639
NEW MEXICO	0	0	0	1	0	1	525
NEW YORK	29	18	13	11	35	106	1839531
OHIO	1	0	4	2	3	10	6498
OKLAHOMA	1	0	1	0	1	3	2374
OREGON	0	2	1	1	0	4	1020
PENNSYLVANIA	3	4	7	1	4	19	11768
RHODE ISLAND	0	0	1	0	0	1	204
TEXAS	2	6	0	2	1	11	4370
UTAH	0	0	0	0	1	1	2724
VIRGINIA	2	1	1	0	0	4	433
WASHINGTON	2	0	2	3	6	13	10699
WISCONSIN	2	2	0	0	0	4	313
FOREIGN	0	0	0	0	2	2	3139
TOTAL	89	55	72	41	88	345	2340452

Page 1

PLAINTIFF'S EXHIBIT M-2:

Sunshine Mining Co. shares
held by individuals, by state.

State	0-99	100-199	200-499	500-1000	1000+ Over	All	Total Shares
ALASKA	15	9	4	1	0	29	2642
ALABAMA	53	22	14	6	2	97	15228
ARKANSAS	20	14	6	2	0	42	5382
ARIZONA	120	58	37	17	5	237	44880
CALIFORNIA	986	444	341	82	48	1901	299190
COLORADO	96	46	41	17	2	202	30279
CONNECTICUT	224	72	62	24	5	387	50675
WASHINGTON D.C.	40	11	16	3	1	71	9853
DELAWARE	26	9	4	1	0	40	3123
FLORIDA	446	259	231	53	28	1017	196487
GEORGIA	39	25	6	1	1	72	6674
HAWAII	45	33	17	6	0	101	13144
IOWA	80	36	23	1	3	143	18670
IDAHO	238	122	93	30	36	519	143939
ILLINOIS	490	306	204	54	40	1094	209601
INDIANA	106	55	44	8	2	215	28953
KANSAS	72	37	28	6	5	148	28854
KENTUCKY	66	21	15	5	2	109	13197
LOUISIANA	33	19	11	4	2	69	11476
MASSACHUSETTS	397	102	72	18	7	596	61955
MARYLAND	197	81	55	14	17	364	80457
MAINE	27	12	6	1	0	46	4417
MICHIGAN	290	150	124	32	15	611	129948
MINNESOTA	113	49	42	11	7	222	53191
MISSOURI	233	92	50	15	11	401	50865
MISSISSIPPI	24	13	16	0	1	54	8017
MONTANA	111	58	42	11	3	225	32208
NORTH CAROLINA	54	20	12	2	3	91	13572
NORTH DAKOTA	12	7	7	1	0	27	3586
NEW HAMPSHIRE	31	11	9	3	2	56	8550
NEW JERSEY	564	211	169	36	15	995	131248
NEW MEXICO	44	23	26	4	2	99	15108
NEVADA	37	15	16	2	2	72	19777
NEW YORK	1363	577	369	91	53	2453	381916
OHIO	257	153	102	18	12	542	88676
OKLAHOMA	43	22	12	1	6	84	17374
OREGON	139	59	47	16	9	270	75113
PENNSYLVANIA	634	234	184	38	15	1105	143936
PUERTO RICO	2	0	0	0	0	2	97
RHODE ISLAND	71	17	8	1	0	97	5798
SOUTH CAROLINA	36	17	10	5	1	69	10420
SOUTH DAKOTA	27	23	10	1	0	61	6752
TENNESSEE	73	33	19	1	0	126	11012
TEXAS	197	124	80	24	14	439	404191
UTAH	47	27	21	3	1	99	13211
VIRGINIA	108	49	39	5	3	204	34278
VERMONT	23	5	6	2	2	38	5858
WASHINGTON	744	313	225	72	60	1414	274008
WISCONSIN	198	138	61	18	14	429	122213
WEST VIRGINIA	36	6	11	1	0	54	5288
WYOMING	15	6	2	1	1	25	2855
FOREIGN	115	49	33	12	17	226	47409
TOTAL	9457	4294	3082	781	475	18089	3395551

PLAINTIFF'S EXHIBIT M-3:

Findings of fact and conclusions of law in Idaho litigation between Sunshine Mining Co. and Great Western United Corp., et al.

In the United States District Court
for the District of Idaho

Civil No. 77-1064

Sunshine Mining Company,
Plaintiff,

vs.

Great Western United Corporation, N. B. Hunt, W. H. Hunt, Hecla Mining Company, Silver Dollar Mining Company, William H. Love, Harry F. Magnuson, Charles E. Schwab, and G. Michael Boswell,
Defendants.

[Filed Apr. 22, 1977]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PURSUANT TO Plaintiff Sunshine Mining Company's motion for preliminary injunction having come on for hearing and oral argument being heard, and having considered the verified complaint and answer and briefs submitted by the parties, together with the exhibits admitted in evidence, the Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. That at all relevant times plaintiff, Sunshine Mining Company ("Sunshine") was and is a corporation organized under the laws of the State of Washington with substantial assets located in this District.

2. Sunshine has approximately 30,000 holders of common stock and has issued and outstanding approximately 5,800,000 shares of common stock.

3. Sunshine's common stock is registered pursuant to Section 12 of the Securities Exchange Act of 1934 (the "1934 Act"). Sunshine's common stock is listed and publicly traded on the New York Stock Exchange and its common stock is also traded on the Spokane Stock Exchange.

4. That at all relevant times defendant, Great Western United Corporation ("Great Western"), was and is a corporation organized under the laws of the State of Delaware, with its principal executive offices located in Dallas, Texas.

5. Since mid-December, 1974, defendants, N. B. Hunt, W. H. Hunt and G. Michael Boswell were and are directors of Great Western and Chairman of the Board, President and Executive Vice President, respectively, of Great Western.

6. Great Western's common stock is registered pursuant to Section 12 of the 1934 Act and is listed and publicly traded on the New York Stock Exchange and Pacific Stock Exchange.

7. Since mid-December, 1974, each of N. B. Hunt and W. H. Hunt were and are the owners of 32.5% of the issued and outstanding common stock of Great Western.

8. That at all relevant times, defendant, Hecla Mining Company ("Hecla") was and is a corporation organized and existing under the laws of the State of Washington with a principal office and substantial assets located in this District, including a non-operating interest in the Unit Area of the Sunshine Mine.

9. At all relevant times prior to March 18, 1977, Hecla owned approximately 210,160 shares of Sunshine's common stock.

10. At all relevant times, defendant, William H. Love ("Love") was and is the Chief Executive Officer and a director of Hecla and a resident of this District.

11. That at all relevant times, Silver Dollar Mining Company ("Silver Dollar"), was and is a corporation organized under the laws of the State of Idaho. Like Hecla, Silver Dollar has a non-operating interest in the Unit Area of the Sunshine Mine.

12. On and prior to March 18, 1977, Silver Dollar owned approximately 124,910 shares of Sunshine's common stock.

13. At all relevant times, defendant, Harry F. Magnuson ("Magnuson"), was and is President and Chief Executive Officer and a director of Silver Dollar and a resident of this District.

14. At all relevant times, defendant, Charles E. Schwab ("Schwab"), was and is a resident of the State of Colorado.

15. Prior to 1958, Sunshine, Hecla and Silver Dollar each owned or controlled certain mining interests in the Coeur d'Alene Mining District of Idaho. On September 25, 1958, they entered into a Unitization Agreement wherein

these interests were consolidated or unified into one area in the Sunshine Mine designated as the Sunshine Unit Area. Sunshine is designated the operator of the Unit Area on terms and conditions set forth in the Unit Agreement.

16. That at all relevant times, Sunshine was and is principally engaged in the mining of silver through the operation of the Sunshine Mine in the Coeur d'Alene Mining District of Idaho; in the manufacture, sale and installation of coated steel, aluminum and wood fences (through its subsidiary, Anchor Post Products, Inc.); the manufacture of piezo electric crystals and crystal filters (through its Piezo Crystal Company division); the manufacture of metal cabinets and accessories for the electronics industry and as a partner in various oil and gas leases.

17. In calendar year 1975, Sunshine, in conjunction with Hecla and Silver Dollar, produced approximately 5,130,000 troy ounces of silver extracted through the facilities of the Sunshine Mine. The production of the Sunshine Mine is not solely the property of Sunshine. The Unitization Agreement provides that Sunshine, as the operator of the mine, is entitled to approximately 57 percent of the profits, while Hecla and Silver Dollar are entitled to approximately 33 percent and 10 percent, respectively. The mine was the largest producer of mine-produced silver in the United States.

18. In calendar year 1975, Sunshine had operating revenue in excess of $55,000,000 and net income in excess of $4,200,000.

19. As of the close of its last fiscal year, ending December 31, 1976, Sunshine's assets were in excess of $56,500,000,

including cash and certificates of desposit in excess of $13,500,000. Its net income was $946,204. Sunshine Mine had been inoperative from March 11, 1976 to March 13, 1977.

20. The evidence is conflicting as to when a commitment from a bank to loan Great Western the funds for a tender offer—March 4th or March 10th or 11th—funds which would be required either (a) to make a "friendly" tender offer for Sunshine common stock, or (b) to make an "unfriendly" tender offer for Sunshine common stock, or (c) to buy the Sunshine Mine.

21. On March 18, 1977, in the morning, Great Western notified the New York Stock Exchange that they were proposing to purchase the Sunshine shares owned by Hecla and Silver Dollar and make a tender offer. Trading in Sunshine's common stock was suspended on March 18 and March 21, 1977. The proposed tender offer announcement was not to be made until Monday, March 21, 1977, and the possibility of a friendly tender offer was still under consideration. Prior to the announcement of the Proposed Offer, Sunshine Common Stock had closed on the New York Stock Exchange at $14.25 per share. Great Western's Proposed Offer was at $15.75 per share.

22. In the interim between February 15 and February 28, 1977, Mr. David Wagnon, a representative of Great Western, accompanied by Mr. John Wilcox, an independent geologist, traveled to Idaho and met with representatives of Hecla and Silver Dollar who were familiar with the operation of the Sunshine Mine. Wagnon or Wilcox was given written information about Sunshine. All of the written information received by Great Western was intro-

duced into evidence. The information received by Great Western was not used to determine whether or not to buy the shares in Sunshine. It was reviewed only to determine whether it contradicted public information. The majority of the information was found to be irrelevant and no conflict was found with publicly available information. Although Great Western attempted to determine whether the information was publicly available, it was unable definitely to determine whether all or some of the information was public. An attempt to summarize and fully disclose the information received by Great Western is included in the Schedule 13D. The Schedule 13D states:

> "The representatives were also provided by Hecla and Silver Dollar with certain information and reports, which were either obtained by Hecla and Silver Dollar from their own investigation of the Unit Area or provided by the Company to Hecla and Silver Dollar pursuant to the unitization agreement covering the Unit Area. Hecla and Silver Dollar did not warrant the accuracy of this information to the Purchaser. The information and reports, some of which may not have heretofore been publicly disclosed, related principally to ore reserves, operating costs, management and operation of Sunshine and indicated that total estimated ore reserves at the Sunshine Mine (including reserves in which others have an interest) at January 1, 1977, totalled approximately 1,385,000 tons with an estimated average grade of approximately 33 ounces of silver per ton; that operating costs (under then existing wage agreements) per ton of ore extracted from the Sunshine Mine

> (which are not necessarily indicative of future operating costs) were substantially higher for the period from 1973 through the first three months of 1976 than operating costs of the above-mentioned Hecla mine; and that, during the period from 1971 through the first three months of 1976, the percentage of silver contained in the ore mined at the Sunshine Mine as compared with silver contained in its ore reserves, on a per ton basis, was substantially lower than the corresponding percentage for the above-mentioned Hecla mine. The Purchaser has no basis to determine the fairness or accuracy of the information which it has received and cannot take responsibility therefor."

23. In 1964, Underweiser and a group of nominees were involved in a proxy contest to obtain seats on the Board of Sunshine. After obtaining seats on the Sunshine Board, Underweiser's group sought and obtained reimbursement. Thereafter, in 1974, a Mr. Ernst proposed a slate of nominees to the Sunshine board, which was not elected. Nevertheless, the Sunshine board of directors recommended to the shareholders that Mr. Ernst be paid $75,000 as reimbursement for expenses in the proxy fight. The payment of $75,000 was in fact made to Ernst. In view of Sunshine's past practice of reimbursing participants in proxy contests for their expenses in similar situations, Great Western believed that if it were successful in obtaining control of Sunshine, the shareholders committee which had been formed by Hecla and Silver Dollar would have accomplished one of its purposes and performed a valuable task to the shareholders of Sunshine and, therefore, it agreed to support (subject to approval by the Sunshine share-

holders) reimbursement of their expenses up to $200,000. In any event, the legality of the reimbursement is not a matter which leads to an injunction against a tender offer.

24. On the morning of March 18, 1977, Mr. Boswell attempted to reach Mr. Underweiser, Chariman of the Board of Sunshine, but Mr. Underweiser was not at his office. Later on that day, Mr. Underweiser returned the call to Mr. Boswell with his attorney on the telephone. Mr. Boswell stated that Great Western was proposing to purchase that day shares of Hecla and Silver Dollar and to make a tender offer. Mr. Boswell requested a meeting that afternoon with Mr. Underweiser. During the conversation, Mr. Boswell stated that Great Western would prefer to make a tender offer with the cooperation of Sunshine and its management.

25. In the afternoon of March 18, 1977, shortly before 3:30 p.m., Great Western executed agreements with Hecla and Silver Dollar for the purchase of 210,160 and 124,910 shares, respectively, of Sunshine common stock and Great Western took possession of certificates evidencing such shares. These agreements provided for delivery by Great Western to Hecla and Silver Dollar of separate unsecured promissory notes in the respective principal amounts of $3,152,400 and $1,873,650, each payable on or before June 30, 1980, with interest payable semi-annually, bearing interest at 130% the prime rate. Great Western also agreed that, in the event it purchased for cash more than 100,000 shares of Sunshine common stock prior to June 30, 1977, at an average per share cost higher than $15.00, the purchase price would be increased to the price paid by Great Western for such shares. Great Western further agreed

that it would arrange for the purchase of the unsecured promissory notes delivered to Hecla and Silver Dollar at their face values plus accrued interest after June 30, 1977 at the request of either Hecla or Silver Dollar. The obligation of Great Western to arrange for the purchase of the notes is not absolute and no obligation exists in the event that Hecla and Silver Dollar sell the notes without recourse on or prior to June 30, 1977.

26. Great Western advised that upon completion of the Offer a study lasting at least three months would be made. Only after such study and upon finding that Sunshine's public filings are accurate would a merger be proposed. In the Schedule 13D Great Western states:

> "The Purchaser has given and will continue to give consideration to what further action, if any, it may wish to take with respect to the remaining Shares after the expiration of the Offer. Among other things, the Purchaser will consider whether to seek to acquire all or a portion of the remaining Shares through open market purchases, through a tender or exchange offer, or by other means deemed advisable by it, or whether to propose a merger or similar combination transaction with the Purchaser, or a wholly owned subsidiary of the Purchaser (possibly involving cash, securities or both), or other transaction involving the Company. In this regard, the Purchaser intends to give serious consideration to a complete combination in the future of the Purchaser and the Company. Whether any such transaction will be proposed or initiated and, if they are, the terms thereof, will, of course, be dependent on a variety of factors, such as the number of Shares

purchased pursuant to the Offer or otherwise, market conditions, future prospects, asset values and earnings. If any such transaction is proposed or initiated, it might be on terms more or less attractive than the Offer, including, without limitation, involving a higher or lower price and the payment of cash or the issuance of securities or both in exchange for Shares or other securities of the Company. There can, of course, be no assurance that any such transaction will be proposed by the Purchaser or consummated, or as to the terms thereof or whether such transaction would be taxable or non-taxable to the holders of Shares."

27. On March 20, 1977, Sunshine advised Great Western by letter that no action was being taken on their proposal for cooperation in a tender offer by reason of insufficient time to respond. As of the April 7, 1977, hearing, Sunshine directors have not accepted or rejected the proposal to cooperate in a tender offer.

28. On March 21, 1977, Great Western issued a press release announcing a tender offer for up to 2,000,000 shares of Sunshine common stock at a price of $15.75 per share; on March 21, 1977, Great Western filed a Schedule 13D and exhibits with the SEC; on March 22, 1977, trading in Sunshine common stock was resumed on the New York Stock Exchange; on April 1, 1977, Sunshine instituted the present action, and this Court entered a temporary restraining order restraining Great Western from proceeding with its tender offer and set a hearing on Sunshine's Motion for a Preliminary Injunction for April 7, 1977, 9:30 a.m.

29. There is no evidence in the record of any conflict of interest between the Hunts and Sunshine. There is no evidence in the record that the Hunts could, even if they so desired, affect any market by controlling production of the Sunshine Mine. The most recent financial report shows Great Western's subsidiary held 12 million ounces of silver as of December 31, 1976. Silver is a world commodity and its price is set on a worldwide basis. In 1975, world silver stocks amounted to over 700 million ounces of silver of which nearly 400 million ounces were available for world consumption. In short, there is no evidence to indicate that in the event the tender offer is completed that the Sunshine stockholder would be adversely affected by the Hunts or Great Western trading in silver or other precious metals.

30(a). Great Western's Schedule 13D and proposed offer to purchase 2,000,000 shares of Sunshine's common stock which was filed with the SEC on March 21, 1977, contains an omission which should be corrected to clarify the statements contained therein: The fact of N. B. Hunt's plea of *nolo contendere*, the statute under which Mr. Hunt was prosecuted, and the $1,000 fine imposed should be fully and adequately disclosed. (Great Western has revised the Proposed Offer to reflect this information.)

(b) The existence of the 1974 consent decree was fully disclosed. This narrow consent decree was entered into by the parties on the understanding that it does not constitute any admission of wrongdoing in any proceeding.

(c) There is no credible evidence in the record of any alleged "plans" by Great Western to reduce Sunshine's earnings.

(d) Great Western's intentions concerning the possibility of a future merger with Sunshine are accurately and adequately disclosed.

(e) Sunshine alleges that the Schedule 13D omits to disclose that a merger or combination would result in unprofitable operations for Sunshine due to amortization and servicing costs. Mr. Bolle testified from Exhibit 89 which was not admitted in evidence for lack of foundation.

(f) There is no evidence in the record that Great Western's financial condition is unstable or that there are any uncertainties surrounding its continued operations. Great Western's accounting certification is admittedly a "very acceptable one." Great Western is a public company and its financial condition is fully described in its public filings, and any tender offer should disclose to the Sunshine shareholders where copies of the public filings could be obtained. Sunshine's own accountant failed to offer any evidence concerning Great Western's alleged financial instability.

(g) There is no evidence in the record concerning the amount of potential liability faced by Great Western in connection with alleged antitrust violations. Further, Great Western's auditors have stated and Great Western has itself disclosed the impossibility of an assessment of the amount of its potential exposure.

(h) There is no evidence in the record that any profit and loss figures will have to be restated.

(i) There is no evidence in the record of any of the alleged conflicts of interest between the Hunts and Great Western on one hand and Sunshine shareholders on the other.

(j) The Federal Trade Commission settlement entered in January, 1977, has already been publicly disclosed by Great Western in its public filings and it need not be further disclosed. The acts leading to the violations which brought about the settlement all took place prior to the Hunts taking control of Great Western and occurred before any of the defendants were officers or directors of that company.

31. The Schedule 13D accurately and completely sets forth and describes Great Western's plans concerning a merger or other combination between Great Western and Sunshine and all material information relating thereto. Since a proposed merger is dependent upon, among other things, the success of Great Western's tender offer, a lengthy study of Great Western and the accuracy of Sunshine's public filings, no further disclosure concerning the effects of a merger need be made at this time.

32. Sunshine's claims that the proposed tender offer by Great Western discriminates against the public shareholders and in favor of Hecla and Silver Dollar are without merit since:

(a) Proration will only occur if more than 2 million shares are tendered and the tender offer is therefore oversubscribed.

(b) The shares owned by Hecla and Silver Dollar have already been transferred to Great Western and Great Western is entitled to vote the shares and receive the dividends thereon. Great Western physically took possession of the shares owned by Hecla and Silver Dollar on March 18, 1977. Shareholders who tender shares pursuant to the

proposed offer will receive cash rather than a promissory note.

(c) Unlike other shareholders, Hecla and Silver Dollar expended substantial monies to improve the management of Sunshine through their efforts to oust present management from their entrenched positions.

(d) Great Western's intentions concerning its support of reimbursement for expenses incurred by Hecla and Silver Dollar are fully described in the Schedule 13D and proposed tender offer.

33. With respect to Sunshine's claims that Hecla provided Great Western with allegedly material non-public information, since Great Western has been unable to determine, despite repeated efforts, whether the information received from Hecla is in whole or in part non-public, it did not "knowingly disclose" non-public information. There is no evidence in the record that the information is "inside" information since there is no evidence in the record that Hecla or Silver Dollar are fiduciaries of or otherwise have any fiduciary obligation to Sunshine. Furthermore, the Unitization agreement fails to designate or otherwise require information received pursuant to its operation be deemed or otherwise kept confidential. There is no evidence in the record that the information received was material and, in any event, Great Western determined the majority of the information was irrelevant, did not rely upon it, and fully and fairly disclosed the existence, and to the extent necessary, the substance of the information which it received. The same or similar information is and has continuously been in the possession of Mr. Underweiser who has consistently purchased shares of Sunshine stock, including 400 shares during December, 1976, without revealing the existence or substance of this allegedly material information to the shareholders.

34. The testimony shows it would be almost impossible to undo a tender offer only after the tender offer has been completed. The tender offer is completed after the tendered stock is purchased and there are no further records of who tendered what. This can occur not less than 10 days after the commencement of the tender offer for less than all the shares of a target company *(see* § 14(d)(6)) and after seven days in all othertender offers (*see* § 14(d)(5)).

35. There is credible, uncontradicted, testimony to the effect that if a preliminary injunction is granted the price of Sunshine's shares will be depressed and the shareholders of Sunshine who wish to sell their stock on the open market will do so at a lower price and will be, therefore, irreparably injured. Great Western has not yet made any tender offer to the shareholders of Sunshine, and the evidence shows that at no time has it disseminated copies of the proposed offer to the financial community or to the shareholders of Sunshine. In the event Great Western made a tender offer containing disclosures which do not comply with the requirements of law, Sunshine may request, and the Court will be able to grant, effective relief at that time. Plaintiffs have failed to allege and demonstrate any irreparable injury. Sunshine has not demonstrated serious questions as to, nor shown a probability of success on, the merits sufficient to grant its motion for a preliminary injunction.

To the extent that any conclusion of law hereinafter set forth also sets forth a finding of fact, the same shall be deemed incorporated herein.

CONCLUSIONS OF LAW

Jurisdiction

1. Jurisdiction over this action is exclusively in this Court pursuant to Section 27 of the 1934 Act, 15 U.S.C. § 78aa.

Issuance of Injunctive Relief

2. In order to obtain the type of preliminary injunctive relief sought by Sunshine, plaintiff must make a clear showing of substantial likelihood of success on the merits. The record before this Court is insufficient to meet this burden with respect to any of the claims by Sunshine.

3. In passing the Williams Act, Congress expressly disclaimed an intention to provide a weapon for management to discourage takeover bids or present large accumulations of stock which would create the potential for such attempts.

4. The courts have interpreted and applied the Williams Act so as to protect shareholders not to give a management a tool to fight off unwelcome tenders.

5. Sunshine has failed to substantiate the heavy burden necessary to warrant the granting of preliminary injunctive relief against a tender offer.

6. The traditional prerequisite of irreparable harm is applicable to actions brought under the Williams Act, and in cases involving contests for corporate control.

7. Since a tender offer, such as Great Western's, for less than all of the outstanding shares of a corporation must remain open for at least ten days after copies of the offer or invitations are first published or set out, the offeror is effectively precluded from purchasing any shares until at

least ten days after the offer is actually commenced. In order to warrant injunctive relief, the injury complained of must be of such imminence that there is a clear and present need for equitable relief.

8. Sunshine is unable to show any imminent irreparable injury warranting the invoking by the Court of its equitable powers to enjoin Great Western's proposed tender offer.

Disclosure

9. In order for an omitted fact to be material, there must be a substantial likelihood that the disclosure of an omitted fact would have been viewed by a reasonable investor as significant in determining whether to tender or withhold his shares.

10. An offeror is not required to make predictions of future behavior which may cause the offeree or the public investor to rely on them unjustifiably.

11. Public companies need not disclose financial information about themselves otherwise publicly available to the shareholders.

12. Sunshine has not shown a probability of success on the merits with regard to its claims of non-disclosure.

Discrimination

13. The purchase by Great Western of and payment for the Sunshine shares owned by Hecla and Silver Dollar is a transaction separate and independent from the proposed tender offer announced by Great Western, and was consummated prior to any public announcement of the pro-

posed tender offer by Great Western and is not a part of that offer.

14. Rule 10b-13 applies only to purchases made after a tender offer is publicly announced or after it is commenced.

15. The purchase by Great Western of and payment for the Sunshine shares owned by Hecla and Silver Dollar does not discriminate against the other tendering shareholders in violation of Sections 14(d)(6) or 14(d)(7), which apply only to shares tendered pursuant to a tender offer.

Allegedly Material Inside Information

16. Possession of a document showing ore reserves other than proven reserves does not place Great Western in possession of material inside information so as to preclude it from making a tender offer without disclosing such information.

Fiduciary Duty

17. Great Western could not violate any fiduciary duty by receiving information from Hecla and Silver Dollar unless Great Western had knowledge that such information was confidential and was disclosed in violation of some duty of those companies.

18. There is no showing of any violation of a fiduciary duty on the part of Great Western.

DATED this 22d day of April, 1977.

/s/ MARION J. CALLISTER
United States District Judge

PLAINTIFF'S EXHIBIT M-4:

N.Y.S.E. pricing history of Sunshine Mining Co. stock from 12/31/76 through 5/18/77

86783310 N SSC SUNSHINE MNG CO
PRICING HISTORY: 1/2/68 TO 5/18/77

DATE	VOLUME	HIGH/ASK	LOW/BID	CLOSE
12/31/76	6700	11.125	11.000	11.000
1/3/77	10000	11.750	11.000	11.625
1/4/77	4100	11.875	11.500	11.875
1/5/77	5800	12.000	11.375	11.625
1/6/77	11800	12.250	11.500	11.875
1/7/77	10400	12.250	11.875	12.125
1/10/77	7600	12.125	12.000	12.000
1/11/77	8400	12.000	11.625	11.750
1/12/77	2800	11.875	11.375	11.875
1/13/77	4900	11.875	11.625	11.625
1/14/77	9400	11.750	11.375	11.750
1/17/77	3600	11.875	11.500	11.875
1/18/77	2900	11.875	11.625	11.875
1/19/77	5300	11.875	11.500	11.875
1/20/77	2800	12.000	11.625	12.000
1/21/77	2100	12.000	11.750	11.875
1/24/77	11100	12.125	11.750	12.125
1/25/77	4300	12.125	12.000	12.000
1/26/77	4500	12.125	11.625	12.125
1/27/77	4400	12.000	11.625	11.625
1/28/77	6100	11.750	11.375	11.375
1/31/77	6700	11.375	11.125	11.125
2/1/77	2400	11.500	11.250	11.500
2/2/77	2700	11.375	11.125	11.250
2/3/77	2300	11.375	11.125	11.250
2/4/77	3800	11.500	11.125	11.250
2/7/77	4700	11.375	11.000	11.250
2/8/77	4300	11.375	11.000	11.375
2/9/77	5100	11.875	11.375	11.750
2/10/77	6400	11.875	11.625	11.625
2/11/77	7300	12.000	11.625	11.875
2/14/77	5700	12.125	11.750	12.125
2/15/77	5400	12.125	11.875	12.000
2/16/77	4000	12.000	11.750	11.875
2/17/77	1700	11.875	11.750	11.875
2/18/77	5000	11.875	11.500	11.875
2/21/77	0	HOL	HOL	HOL
2/22/77	10700	11.875	11.500	11.750
2/23/77	24500	12.625	11.750	12.375
2/24/77	21300	13.000	12.500	12.750
2/25/77	8000	12.625	12.250	12.500
2/28/77	10400	12.750	12.375	12.625
3/1/77	3100	12.500	12.250	12.375
3/2/77	5200	12.625	12.375	12.625
3/3/77	9200	12.750	12.375	12.625
3/4/77	12000	12.750	12.375	12.750
3/7/77	38600	13.625	12.875	13.500
3/8/77	12500	13.500	13.125	13.375

3/9/77	14000	13.875	13.250	13.875
3/10/77	18500	14.000	13.500	13.500
3/11/77	14900	13.625	13.250	13.375
3/14/77	5500	13.500	13.250	13.500
3/15/77	8300	13.625	13.250	13.625
3/16/77	9700	13.875	13.625	13.875
3/17/77	20700	14.500	13.875	14.250
3/18/77	0	NA	NA	NA
3/21/77	0	NA	NA	NA
3/22/77	104700	16.000	15.750	16.000
3/23/77	81600	16.125	15.875	16.000
3/24/77	47300	16.000	15.750	15.875
3/25/77	28200	16.000	15.625	15.750
3/28/77	34400	15.875	15.750	15.875
3/29/77	57300	15.875	15.250	15.375
3/30/77	55300	15.750	14.750	15.250
3/31/77	6800	15.375	14.750	15.375
4/1/77	9500	15.375	15.250	15.375
4/4/77	10400	15.250	14.500	14.750
4/5/77	11300	15.000	14.500	14.750
4/6/77	26100	14.750	14.375	14.750
4/7/77	8600	14.875	14.375	14.625
4/8/77	0	HOL	HOL	HOL
4/11/77	3800	14.750	14.625	14.625
4/12/77	6700	14.875	14.625	14.625
4/13/77	8800	15.000	14.750	15.000
4/14/77	4500	15.000	14.750	14.750
4/15/77	4400	15.000	14.750	14.875
4/18/77	3200	14.875	14.750	14.750
4/19/77	4700	14.875	14.750	14.750
4/20/77	2500	14.875	14.750	14.750
4/21/77	2600	15.000	14.750	14.750
4/22/77	9700	14.875	14.625	14.875
4/25/77	9000	15.125	14.750	14.750
4/26/77	11100	15.000	14.875	15.000
4/27/77	5400	15.125	15.000	15.000
4/28/77	9800	15.000	14.875	14.875
4/29/77	6600	15.000	14.750	15.000
5/2/77	2900	14.875	14.750	14.750
5/3/77	1300	14.875	14.750	14.750
5/4/77	3500	14.875	14.750	14.750
5/5/77	1200	14.750	14.750	14.750
5/6/77	5700	15.000	14.750	15.000
5/9/77	5100	15.000	14.750	14.750
5/10/77	6200	14.875	14.750	14.875
5/11/77	2900	15.000	14.750	14.875
5/12/77	6700	15.000	14.625	15.000
5/13/77	16800	15.250	14.875	15.000
5/16/77	4300	15.000	14.875	14.875
5/17/77	4700	14.875	14.750	14.750
5/18/77	4600	14.750	14.750	14.750
5/19 WSJ	3500	14.875	14.625	14.750
5/20 Quotron	6700	14.75	14.50	14.75

ISSUE:
EXIT
--BYE
44.76 TRU X .12=$5.37
TERMINAL TIME: 0:05:08

PLAINTIFF'S EXHIBIT M-5:

Sunshine Mining Co.'s amendment to S.E.C. Schedule 14D

[Securities and Exchange Commission Letterhead]

ATTESTATION

I HEREBY ATTEST that attached is a full, true and complete copy of:

Amendment # 4 to Schedule 14D filed with this Commission April 7, 1977 by Sunshine Mining Company, in the matter of Sunshine Mining Company, pursuant to the provisions of the Securities Exchange Act of 1934, as amended, (File No. 5-1).

on file in this Commission

May 20, 1977

(Date)

/s/ CHARLES A. MOORE
Records Officer

It is hereby certified that James C. Foster, Director, Office of Reports and Information Service, Securities Exchange Commission, Washington, D.C., which Commission was created by the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), is official custodian of the books and records of said Commission, and all books and records created or established by the Federal Trade Commission pursuant to the provisions of the Securities Act of 1933 and transferred to this Commission in accordance with Section 210 of the Securities Exchange Act of 1934, and was such official custodian at the time of executing the above attestation, and that

he, and Charles A. Moore, Records Officer, and John H. Medlock, Chief, Administrative Proceedings Section, or any one of them, are authorized to execute the above attestation.

[SEAL]

By the Commission
/s/ GEORGE A. FITZSIMMONS
Secretary
George A. Fitzsimmons

SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

AMENDMENT # 4

TO

SCHEDULE 14D

FILED PURSUANT TO RULE 14d-4 UNDER THE SECURITIES EXCHANGE ACT OF 1934, AS AMENDED

SUNSHINE MINING COMPANY

(Insurer to which this statement relates)

SUNSHINE MINING COMPANY

(Exact name of person filing)

Items 3 and 4 of the Schedule 14D filed by Sunshine Mining Company, dated March 22, 1977, are hereby amended to read as follows:

Item 3. *Persons Retained, Employed or to be Compensated*

Wertheim & Co., Inc. ("Wertheim") has been retained to advise Sunshine in connection with the proposed tender offer and other offers, if any, which may be made for shares of common stock of Sunshine, and to actively solicit other tender offers, or other offers, if in Wertheim's judgment such solicitation is warranted under the circumstances. In connection with these services, Sunshine has agreed to (i) pay Wertheim a minimum fee of $200,000; (ii) reimburse Wertheim for its out-of-pocket expenses, including the fees and expenses of its counsel; and (iii) indemnify Wertheim and its controlling persons against certain liabilities which may arise under applicable securities laws or otherwise as a result of its activities on behalf of Sunshine.

Sunshine has also agreed to pay Wertheim additional fees which are contingent upon the occurrence of certain events. The amount of any additional fees will be based upon various factors, including: (i) in the case of a tender offer by Great Western or an acquisition ("Acquisition") by Great Western of control of Sunshine or substantially all of the assets of Sunshine, as a result of a merger, exchange offer or similar transaction, (a) whether management of Sunshine opposes the transaction, in which event

Wertheim will only be entitled to additional compensation if Great Western fails to acquire more than 330,000 shares of common stock of Sunshine in a tender offer in addition to the shares it now owns; (b) the number of shares of common stock of Sunshine acquired by Great Western; (c) the price per share paid by Great Western in a tender offer to the extent in excess of $16.75 per share (exclusive of brokerage commissions and similar fees); and (d) the aggregate purchase price paid by Great Western in an Acquisition, if there is one; and (ii) in the case of a tender offer or an Acquisition by any person other than Great Western, if there is one, (a) the aggregate purchase price paid by such person in a tender offer, to the extent in excess of $33,500,000; and (b) the aggregate purchase price paid by such person in an Acquisition the negotiations for which commenced prior to March 30, 1978. In no event, however, will the aggregate fees, including these additional fees, payable by Sunshine to Wertheim under the agreement exceed $1,000,000. These additional fees are payable if any of the above described events occur prior to March 30, 1979 even if Wertheim's services have previously been terminated.

The agreement with Wertheim will remain in effect until March 30, 1979, unless it is terminated earlier by either party by notice to the other. As noted above, the compensation provisions of the agreement remain in effect through March 30, 1979, and the indemnity provisions will continue notwithstanding the termination or expiration of the agreement.

The foregoing description of the agreement between Sunshine and Wertheim is qualified by reference to the agreement, a copy of which is filed herewith as Exhibit E.

Sunshine does not regard the activities or proposed activities of Wertheim to constitute solicitations or recommendations to security holders within the meaning of this Item 3.

Georgeson & Co. has been retained by Sunshine, and may in the future make solicitations or recommendations on behalf of Sunshine to security holders of Sunshine. Georgeson & Co. will receive usual and customary compensation from Sunshine for its services.

Item 4. *Material to be filed as Exhibits*

(a) Exhibit A: Form of Press Release dated March 22, 1977.

(b) Exhibit B: Form of Press Release dated March 31, 1977.

(c) Exhibit C: Form of Press Release dated April 1, 1977.

(d) Exhibit D: Form of Press Release dated April 4, 1977.

*(e) Exhibit E: Agreement dated March 30, 1977 between Wertheim & Co., Inc. and Sunshine Mining Company.

*(f) Exhibit F: Form of Press Release dated April 7, 1977.

*Filed herewith.

I certify that to the best of my knowledge and belief the information set forth in this statement is true, complete and correct.

April 7, 1977

SUNSHINE MINING COMPANY

/s/ IRVIN P. UNDERWEISER
Chairman of the Board

EXHIBIT E

WERTHEIM & CO., INC.
Member New York Stock Exchange, Inc.
200 Park Avenue
New York, N.Y. 10017

March 30, 1977

Sunshine Mining Company
405 Park Avenue
New York, New York 10017

Attention: Mr. Irwin F. Underweiser, Chairman

Dear Sirs:

We understand that on March 20, 1977, the Board of Directors of Sunshine Mining Company ("Company") authorized the retention of Wertheim & Co., Inc. ("WCI") to provide financial consulting and other services in connection with a proposed tender offer ("Proposed Offer") to be made for certain outstanding common shares of the Company by Great Western United Corporation ("GWU") and related matters. This letter sets forth our agreement concerning the services to be provided by WCI, and confirms the understanding we have reached today regarding the fees to be paid and the indemnification to be afforded to WCI by the Company, as well as the indemnification to be afforded the Company by WCI.

I. *Services To Be Provided By WCI.* In consideration of the covenants and agreements herein set forth, WCI will render to the Company such services within the scope of WCI's experiences and expertise as the Company may at any time and from time to time request in connection with

the Proposed Offer and related matters. Without limiting the generality of the foregoing, WCI will, upon request of the Company:

(a) Consult with and render advice to the Company with respect to the adequacy of the consideration and other terms, and the fairness and reasonableness, of the Proposed Offer and any other offers made by GWU related to the Company; and

(b) Render advice of the type specified in subsection (a) above in connection with offers to holders of the Company's outstanding common stock which may be competitive with any offer made by GWU and actively solicit competing tender or other offers if in WCI's judgment such solicitation is warranted under the circumstances.

II. *Compensation.* The Company agrees to pay WCI, as compensation for its services hereunder, a fee consisting of the following:

(a) *Fee.* As a retainer, the non-refundable sum of $200,000, of which $100,000 shall be paid upon the signing of this Agreement and the balance shall be payable 30 days after the signing of this Agreement.

(b) *Expenses.* The full amount of any out-of-pocket expenses incurred by WCI in the performance of its obligations under this Agreement, including, but not limited to, the fees and disbursements of WCI's counsel, payment of which shall be made promptly after presentment by WCI to the Company at any time or from time to time; and

(c) *Additional Fees.* An additional fee in an amount in each case other than the cases provided for in para-

graphs 1 and 2 of this subsection (c) below by which any of the following exceed the fee provided for in subsection (a) of this Section II:

1. In the event that management the Company does not support any tending offer for shares of the Company's common stock by GWU and GWU is unable to acquire more than 330,000 of the outstanding shares of common stock of the Company in such tender offer (other than the shares currently owned by GWU as set forth in its Statements on Schedule 13D dated March 21, 1977; such shares are herein referred to as the "GWU Shares"), a sum of $200,000 in addition to the fee provided in subsection (a) of this Section II;

2. In the event of a cash tender offer by GWU which is not opposed by the management of the Company, a sum of $100,000 plus 5% of the result obtained by multiplying the difference (if any) between $16.75 per share and the per share purchase price paid for shares of Company common stock in such tender offer (exclusive of brokerage commissions and similar fees) by the lesser of the ?????????? the number of shares which GWU is obligated to purchase in such tender offer, as set forth in the terms thereof or the number of shares actually purchased;

3. In the event that, in a transaction or series of related transactions that is not opposed by the management of the Company, control or substantially all the assets of the Company is acquired by GWU as a result of a merger, exchange offer or similar transaction (regardless of whether or not the Company or GWU is the survivor of any such transacton), or as a result of a combination of a tender offer and a

merger, exchange offer or similar transaction, a sum equal to ½ of 1% of the aggregate purchase price payable in such merger, exchange offer or similar transaction, or in such combination (other than brokerage commissions and similar fees), provided, however, that in the event WCI is requested by the Company to render an opinion for use by the Company in any proxy material, any other material furnished to the Company's shareholders or registration statement relating to such transaction, WCI shall reduce the fees payable to it under this Agreement by the amount of $200,000 if it refuses to render such opinions, and provided further that any fee payable to WCI pursuant to Section II(c)2 hereof shall be credited against any fee payable to WCI pursuant to Section II(c) 3 hereof;

4. In the event that shares of the Company's common stock are acquired as a result of a tender offer by an offeror other than GWU, a sum equal to 5% of the amount by which the aggregate purchase price paid for all shares purchased by such other offeror exceeds $33,500,00, provided, however that any fees payable to WCI pursuant to Section II(c)1 hereof shall be credited against any fee payable to WCI pursuant to Section II(c) 4 hereof;

5. In the event that control of the Company is acquired, or substantially all its assets are sold, as a result of a merger, exchange offer or similar transaction (regardless of whether or not the Company is the survivor of any such transaction), or as a result of a combination of a tender offer and a merger, exchange offer or similar transaction, with a company other than GWU, a sum equal to 1% of the aggregate purchase price paid in such merger, exchange

offer or similar transaction, or such combination (not including brokerage commissions or similar fees), provided, however, that in the event WCI is required to render an opinion for use by the Company in any proxy material, other material furnished to the Company's shareholders or registration statement relating to such transaction, WCI shall reduce the fee payable to it under this Agreement by the amount of $200,000 if it refuses to render such opinion, and provided further that any fee payable to WCI pursuant to Section II(c)1 hereof or Section II(c)4 hereof, or both, shall be credited against any fee payable to WCI pursuant to this Section II(c)5; WCI shall not be entitled to any fee under this Section II(c)5, however, unless negotiations involving the parties to the transaction for which the fee is claimed commenced within one year of the date hereof and the transaction was completed within two years of the date hereof, provided that said two-year period shall be tolled on a day-by-day basis if and to the extent completion of such transaction shall have been delayed by litigation under, or by any action of any regulatory agency or governmental body involving, anti-trust or similar laws;

(d) Payments required to be made by the Company to WCI under Section II(c) hereof shall be made promptly after they become due upon completion of the transaction in question pursuant to the provisions of that Section. In order to prevent dilution of the fees payable to WCI hereunder, the provisions of this Section II shall be subject to appropriate adjustment in the case of stock splits, stock dividends or other similar events by the Company or affecting the Company's common stock. The other provisions of this Section II to the contrary notwithstanding, the aggregate fees payable to WCI by the Company pursuant to this Agreement shall not exceed $1,000,000.

III. *Undertakings of the Company.* In connection with any tender offer by GWU or any other transaction which would be the subject of compensation under this Agreement, the Company undertakes to provide WCI, prior to their use, with copies of all documents or other materials prepared by the Company relating to such tender offer or other transaction (i) filed with the Securities and Exchange Commission or any other federal or state agency, (ii) mailed or otherwise sent to shareholders of the Company, or (iii) published in any newspaper or other publication. The Company further undertakes that if any documents or materials required to be delivered to WCI hereunder name or make reference to WCI or if any work product of WCI prepared pursuant to this Agreement is used or referred to in such documents or materials, the Company will not file, mail, publish or otherwise use such documents or materials without the prior written consent of WCI, which consent shall not be unreasonably withheld by WCI.

IV. *Indemnification and Contribution.* (a) The Company agreed to indemnify and hold harmless WCI and each person, if any, controlling WCI within the meaning of the Securities Exchange Act of 1934, as amended (the "Act"), against claims, damages or liabilities, joint or several, to which they or any of them may become subject, under the Act or otherwise, and to reimburse WCI and such controlling persons for any reasonable expenses (including counsel fees) incurred by them in connection with investigating or defending any such losses, claims, damages, liabilities or actions, insofar as such losses, claims, damages or

liabilities (or actions in respect thereto) arise out of or are based upon (i) any untrue statement or alleged untrue statement of a material fact contained in any material used in connection with the Proposed Offer or any other transaction or arise out of or are based upon the omission or alleged omission to state therein a material fact required to be stated in such material or necessary to make the statements in such material not misleading or (ii) the failure of the Company or WCI, or both, to comply with the requirements of the Act or any similar federal or state law. The indemnity agreement contained in this paragraph, however, shall not extend to any loss, claim, damage, liability or action or any reimbursement (x) if the untrue statement or alleged untrue statement or omission or alleged omission was made in reliance upon and in conformity with information furnished to the Company by WCI specifically for use in any material by or on behalf of the Company, or (y) if the failure of the Company or WCI, or both, to comply with the requirements of the Act or any similar federal or state law is based on matters solely in the control of WCI.

(b) The Company further agrees to indemnify and hold harmless WCI against any other claims, damages or liabilities arising out of or based upon WCI's obligations under this Agreement and to reimburse WCI for any reasonable expenses (including counsel fees) incurred in connection with investigating or defending any such losses, claims, damages or liabilities (or actions in respect thereof), provided, however, that the indemnity agreement contained in this paragraph shall not extend to any loss, claim, damage, liability or action or any reimbursement if and to the extent that any such loss, claim, damage, liability or action or any

right to reimbursement arises solely by reason of any act or omission to act on the part of WCI not taken in good faith or by reason of gross negligence on the part of WCI.

(c) WCI shall not be entitled to indemnification under the provisions of (a) or (b) above unless it shall have given the Company notice of any action which may give rise to a loss, claim, damage or liability for which indemnification is sought and afford the Company an opportunity to participate in the defense of such action with Messrs. Fried Frank Harris Shriver and Jacobson, Messrs. Spengler, Carlson, Gubar, Churchill & Brodsky, or other counsel reasonably satisfactory to WCI. The failure to give such notice to the Company, however, shall not relieve the Company from any other liability it would have to WCI.

(d) In order to provide for just and equitable contribution in any case in which WCI makes a claim for indemnification pursuant to this Agreement but it is judicially determined (by the entry of a final judgment or degree by a court of competent jurisdiction and the expiration of time to appeal or the denial of the last right of appeal) that such indemnification may not be enforced, the Company and WCI shall contribute to the aggregate losses, claims, damages or liabilities to which they may become subject in such proportion that WCI is responsible for 2% of such aggregate losses, claims, damages or liabilities and the Company is responsible for the remaining portions; provided, however, that in no event shall WCI be required to contribute an amount in excess of the aggregate fees paid to it under this Agreement.

(e) WCI agrees to indemnify and hold harmless the Company and each person, if any, controlling the Company,

within the meaning of the Act, against claims, damages or liabilities, joint or several, to which they or any of them may become subject, under the Act or otherwise, and to reimburse the Company and such controlling person for any reasonable expenses (including counsel fees) incurred by them in connection with investigating and defending any such losses, claims, damages, liabilities or actions insofar as such losses, claims, damages or liabilities (or actions with respect thereto) arise out of or are based upon (x) any untrue statement or alleged untrue statement of a material fact contained in any material used in connection with the Proposed Offer or any other transaction or arise out of or are based upon the omission or alleged omission to state therein any material fact required to be stated in such material or necessary to make the statements in such material not misleading, if the untrue statement or alleged untrue statement or omission or alleged omission was made in reliance upon and in conformity with information furnished to the Company by WCI specifically for use in any material by or on behalf of the Company, or (y) the failure of the Company, or WCI, or both, to comply with the requirements of the Act or any similar federal or state law, if such failure is based on matters solely within the control of WCI. The Company shall not be entitled to indemnification under the provisions of this subsection unless it shall have given WCI notice of any action which may give rise to a loss, claim, damage or liability for which indemnification is sought and afford WCI an opportunity to participate in the defense of such action with Reavis & McGrath or other counsel reasonably satisfactory to the Company. The failure to give such notice to WCI, however, shall not relieve WCI from any other liability it would have to the Company.

V. *Termination.* (a) Except as otherwise provided herein, this Agreement shall remain in full force and effect for a period of two years from the date hereof, provided, however, that in no event shall the provisions of Section IV hereof terminate.

(b) The provisions of, and rights and obligations of the respective parties under, Sections I and III of this Agreement may be terminated by either party hereto upon written notice to the other party.

The Company agrees that if WCI exercises its rights to terminate this Agreement, any material subsequently used by or on behalf of the Company shall not refer to WCI.

If the foregoing correctly sets forth the understanding between us, please so indicate in the space provided below for the purpose, whereupon this letter and your acceptance shall constitute a binding agreement between us.

Very truly yours,

WERTHEIM & CO., INC.

/s/ JAMES A. HARMON
Chairman, Investment
Banking Committee

Accepted as of the date first above written.

SUNSHINE MINING COMPANY

/s/ IRWIN P. UNDERWEISER
Chairman of the Board

EXHIBIT F

PRESS RELEASE

For Immediate Release
April 7, 1977

Sunshine Mining Company announced today that Great Western United Corporation had made motions in a United States District Court in Texas, and that Hecla Mining Company and Silver Dollar Mining Company had made motions in a United States District Court in New York, to prevent Sunshine from further proceeding in the action Sunshine has brought in Idaho to enjoin Great Western and all persons acting in participation with it from making a tender offer for shares of Sunshine. All of these motions were denied. A hearing in the Idaho District Court on Sunshine's motion for a preliminary injunction is expected to begin today.

Sunshine also announced that the United States Court of Appeals for the Fifth Circuit has stayed the order issued by a United States District Court in Texas enjoining enforcement by the States of Idaho, New York and Maryland of their respective takeover laws in connection with Great Western United's proposed offer to acquire up to 2,000,000 shares of Sunshine.

In granting this stay, the Court of Appeals noted that this proceeding involves novel and difficult issues which have a broad impact upon federalism. The Texas District Court was directed by the Court of Appeals to consider and rule upon the issues of its jurisdiction and venue before considering the merits of Great Western's complaint. The Court of Appeals also stated that "should the district court determine that it has jurisdiction and venue, it should consider certification of this determination [for appeal] . . . before trial on the merits." The District Court hearing is presently scheduled for Friday, April 8, 1977 in Dallas, Texas.

Mel Baptie
- got ad
Since we know comments are con
Said he is preparing *a letter*
of *comments*
relates to Sections *12-15*
Not inclined to hold a
hearing—comply w/
comments
& 20 day period commences.
make amendments then *issue permit 20 days starts.*
or
take exception & they would
go immediately to a hearing

PLAINTIFF'S EXHIBIT 4
IDAHO COMMENT LETTER

JOHN V. EVANS
Governor

(SEAL)

STATE OF IDAHO
Department of Finance
Boise 83720
Tom L. McEldowney
Director

March 25, 1977

Steven C. Metzger
2827 First National Bank Building
Dallas, Texas 75202

Re: Great Western United Corporation Offer to Purchase Shares of Common Stock of Sunshine Mining Company and the Registration of Such Offer Under Title 30, Chapter 15, Idaho Code and the Regulations Adopted Thereunder.

Dear Mr. Metzger:

During the afternoon of March 21, 1977, Mr. David J. Wagnon, Vice-President of Western Investment Company, a subsidiary of Great Western United Corporation and Mr. Robert L. Magnuson attorney of the law firm Witherspoon, Kelley, Davenport & Toole, Spokane, Washington, hand delivered an application for registration under the Idaho Corporate Take-Over Law on behalf of Great Western United Corporation to this office.

We have reviewed the application of registration and the proposed form of Offer to Purchase for compliance with the Idaho Code and appropriate regulations thereunder. We present the following comments:

(1) Pages six through ten are missing from schedule 13D which has been marked as exhibit 1A under the application for registration.

(2) We ask that schedule A of schedule 13D be incorporated in the proposed form of Offer to Purchase.

(3) We ask that page 1 of the proposed form of Offer to Purchase set-forth a table of contents listing Sections 1-15 and identifying each section by their appropriate page numbers. We also ask that Sections 12, 13, 14 and 15 be placed at the front of the proposed form of Offer to Purchase immediately following Section 3 and preceding Section 4 on page 8.

The following comments pertain to the disclosure made within the proposed Offer to Purchase.

On page 29 we ask that the nature of the litigation between Sunshine Mining Company and the Shareholders Committee be disclosed and that the status of Charles E. Schwab be indicated. Disclose what is meant by the statement, "The purchaser understands that the committee has been desolved."

The second paragraph of page 29 begins: "Representatives of the purchaser met with Mr. Schwab on February 10, 1977 and with representatives of both Hecla Mining Company and Silver Dollar Mining Company and Mr. Schwab on February 15, 1977 to ascertain whether the purchaser had an interest in purchasing the shares." Please disclose who arranged those meetings and what communications took place at those meetings.

The second paragraph of page 29 begins: "During the week of February 21, 1977 representatives of the purchaser visited a mine in the Coeur d'Alene mining district operated by Hecla Mining Company which they were advised had operations generally comparable to those of the company." Please disclose who extended the invitation. Also identify the mine and who advised the representatives that the mine had operations generally comparable to that of Sunshine Company and upon what basis such advice was given.

The second sentence of page 30 states the representatives were also provided by Hecla Mining Company and Silver Dollar Mining Company with certain information and reports. Please disclose the names of the persons who provided such reports and identify the reports. Please furnish one copy of each report to the Department of Finance.

The third sentence of page 31 states, "Upon consummation of the Offer to Purchase, the purchaser intends to further investigate and evaluate the company's mining and other operations. Please disclose the extent of the purchaser's current evaluation and investigation of the company's mining and other operations and also disclose what further investigation and evaluation would be made upon the consummation of the offer.

The second sentence on page 38 states the purchaser believes that the offer will not be effective in the State of Idaho during any such hearing and that the purchaser

would not be permitted to purchase or pay for any shares tendered by shareholders in Idaho during such period. This sentence implies that the purchaser would be allowed to make tenders outside the State of Idaho. Section 30-1503(1), *Idaho Code*, states in part: "It is unlawful for any person to make a take-over offer involving a target company in this state, or to acquire any equity securities of a target company pursuant to the offer, unless the offer is effective under this chapter or is exempted by rule or order of the Director. It is our position that tenders made within and without of the State of Idaho would be unlawful unless the tender offer is effective or exempt under Chapter 15, Title 30 of the Idaho Code.

The provisions of paragraph 3 subpart d under caption *Registration of Take-Over Offers* as set-forth on pages 2 and 3 of the adopted Rules and Regulations under Title 30, Chapter 15, Idaho Code requires that information required of Items 1 through 9 of Form IDF-03-60-75 or an adequate summary thereof be disclosed in the proposed form of Offer to Purchase. We believe that disclosure required by Item 8 of Form IDF-03-60-75 which states: "Material information concerning the organization and operations of any offeror which is a corporation, including the year, form and jurisdiction of its organization, *a description of each class of its capital stock* and *long-term debt*, a description of the business done by the offeror and its subsidiaries and any material changes therein during the past three (3) years, *a description of the location and character of the principal properties of the offeror and its subsidiaries*, a description of any material pending legal or administrative proceedings in which the offeror or any of its subsidiaries is a party,

the names of all directors and executive officers of the offeror and their material business activities and affiliations during the past three (3) years, and financial statements of the offeror for its three (3) most recent annual accounting periods and any current period is not adequately disclosed under Section 12 on page 39. Please amend this section to include additional disclose concerning the items underlined [italicized] in item 8 above.

The last sentence of the first paragraph of page 40 states, "During the fiscal year ended May 31, 1975, the purchaser determined to dispose of "Great Western Cities" but no offers to purchase "Great Western Cities" are being considered at the present. Please disclose the reasons for deciding to dispose of "Great Western Cities".

The first sentence of the second paragraph on page 41 states, "The purchaser has filed with the Commission preliminary proxy material relating to a proposed plan of recapitalization. We ask that a more definitive description of the proposed plan be disclosed indicating any possible affect such plan might have with regard to the Sunshine Company.

We ask that the summary of litigation disclosed beginning on page 44 and ending on page 46, more accurately reflect the legal proceedings disclosed under item 5 in form 10K of Great Western United Corporation.

The second paragraph of page 47 states, "Approximately 33 million dollars required by the purchaser to purchase 2 million shares under the offer will be obtained under a 35 million dollar commitment to Western Investment from a bank from which it has borrowed in the past. You have

asked in a separate letter that the identity of the bank be held confidential. We agree to meet this request, however, we ask that one copy of the commitment agreement be furnished to the Department under confidential letter.

The second paragraph on page 49 states, "The purchaser expects that it will not depend upon earnings of the company (except dividends at the current rate annually paid by the company) to repay any borrowings under the commitment and under other presently outstanding indebtness of the purchaser and its subsidiaries. The purchaser does not intend to utilize shares or assets of the company for such purpose." Please disclose how the purchaser expects to repay the borrowings under the commitment.

The last sentence on page 49 states, "The purchasers [sic.] objective in making the offer is to acquire working control of the company." Please define and disclose what is meant by working control of the company.

The second sentence on page 51 states, "Although the purchaser has not decided which additional individuals it might nominate, such nominees will include Messrs., N. B. Hunt, W. H. Hunt and G. Michael Boswell." Please disclose whether or not there are any informal or formal agreements with Hecla Mining Company, Silver Dollar Mining Company or members of the Sunshine Shareholders Committee which would agree to appoint such persons to the Board of Directors of the Sunshine Company on behalf of the purchaser.

The second sentence on page 53 states, "The purchaser believes a stockholder should not be subject to such risk of ordinary income treatment if all of the shares owned by

him directly or indirectly were disposed of either pursuant to the offer or at any time prior to the effective date of any future merger or similar combination, etc." We ask that the wording, "subject to such risk" be eliminated from this sentence.

The second paragraph of page 53 states, "Under the laws of the State of Washington any merger, consolidation, liquidation or sale of all or substantially all of the assets of the company would require the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote." Please disclose whether or not under Washington law the purchaser upon obtaining a majority representation of the Board of Directors could instruct such directors to authorize the issuance or sale of the company's authorized but unissued common stock, without the affirmative vote of 66⅔ percent of the outstanding shares entitled to vote. Also describe the affect of such action upon the Sunshine Company if the purchaser decided to take such action.

The second paragraph on page 56 states that if the purchaser acquires control of the company, etc. Please disclose and indicate what is meant by the word "control" as used in that sentence. Also indicate what impact a merger or disposition of some or all of the company's subsidiary and divisions would have on the Sunshine Mining Company and those stockholders who, for whatever reason, do not tender their shares pursuant to this offer and whether or not assets or funds received would be used to repay monies obtained from the bank commitment for this tender offer either directly or indirectly.

The last sentence of the second paragraph on page 56 states, "The purchaser has advised Hecla Mining Company and Silver Dollar Mining Company that it would support reimbursement by the company of the expenses of Hecla Mining Company and Silver Dollar Mining Company in connection with the activities of the Shareholders Committee to maximum of $200,000." It is the Department's view that this reinstatement if made may constitute a violation under Section 30-1505(2), *Idaho Code,* which states in part: "It is unlawful for any offeror or target company or any controlling person of an offeror or target company or any broker-dealer acting on behalf of an offeror or target company to engage in any fraudulent, deceptive or manipulative acts or practices in connection with a take-over offer. Fraudulent, deceptive and manipulative acts or practices include, without limitation: (2) Sale by any controlling stockholders of a target company in connection with a take-over offer of all or part of their equity securities to the offeror at a price higher than that to be paid other stockholders pursuant to the offer."

Please disclose whether or not the purchaser has or intends to enter into any working or financial agreements other than the March 18, 1977 stock purchase of 335,070 shares of stock in Sunshine Mining Company with Hecla Mining Company, Silver Dollar Mining Company or any member of the dissolved Sunshine Shareholders Committee.

Based upon the above comments and under the provisions of Section 30-1503(3), *Idaho Code,* the Director has summarily ordered a delay of the effective date of the registration and the proposed tender offer.

The Department takes the position that the registration statement filed March 21, 1977 is not complete, as not all of the material information is disclosed. The twenty days referred to in Section 30-1503(5), *Idaho Code,* begins to run from the time a complete registration statement within the meaning of Section 30-1503(2), *Idaho Code,* is received and filed. Therefore, this Department will regard the filing date of Great Western United Corporation registration to be the date upon which the amendments, as requested above, are received and accepted as complete. The twenty day limit for hearing shall begin to run as of such date.

The Department is prepared to issue a permit granting effectiveness to this registration upon a determination that the requested amendments are complete, contain all of the requested information, and otherwise comply with Chapter 15, Title 30, Idaho Code and the regulations adopted thereunder.

Should Great Western United Corporation decide not to file the amendments as requested, the Director is prepared to call for a hearing on his own initiative, to determine whether or not the application filed on March 21, 1977 contains sufficient disclosure.

Sincerely,

/s/ MELVIN J. BAPTIE
Deputy Administrator-Securities

MJB/rm

PLAINTIFF'S EXHIBIT 5—IDAHO ORDER

In the Office of the Director of Finance,
State of Idaho

In the matter of

Great Western United Corporation's offer to purchase shares of common stock of Sunshine Mining Company

ORDER

WHEREAS, on the afternoon of March 21, 1977, GREAT WESTERN UNITED CORPORATION filed an application for registration under the Idaho Corporate Take-Over Law relating to an offer to purchase shares of common stock of Sunshine Mining Company; and

WHEREAS, Title 30, Chapter 15, *Idaho Code,* known as the Idaho Corporate Take-Over Law, governs the take-over offer filed by GREAT WESTERN UNITED CORPORATION; and

WHEREAS, the administration of the Idaho Corporate Take-Over Law has been placed with the Director, Department of Finance; and

WHEREAS, Section 30-1503(3), *Idaho Code,* provides that the director may by order summarily delay the effective date of the offer if he determines that the registration statement does not contain all of the information specified in section 30-1503(2), *Idaho Code,* or does not

provide full disclosure to offerees of all material information concerning the offer; and

WHEREAS, the offering statement has been carefully considered and analyzed; and,

WHEREAS, certain material information has been found to be lacking in the registration statement and the proposed form of Offer to Purchase; and

WHEREAS, the material information not provided in connection with the said take-over offer is fully specified in the letter of comment dated March 25, 1977, given to GREAT WESTERN UNITED CORPORATION, and incorporated in this Order by reference.

NOW THEREFORE, IT IS HEREBY ORDERED THAT the effective date of the offer be delayed.

DONE AND DATED this 25th day of March, 1977.

/s/ TOM D. MCELDOWNEY
Director of Finance
State of Idaho

PLAINTIFF'S EXHIBIT 11:

Wall Street Journal quotations on Sunshine Mining Co. stock from 3/15/77 to 4/6/77

SUNSHINE MINING COMPANY QUOTATIONS
AS EXTRACTED FROM THE WALL STREET JOURNAL

Date	Volume	High	Low	Close	Change
3/15	8,300	13⅝	13¼	13⅝	+ ⅛
3/16	9,700	13⅞	13⅝	13⅞	+ ¼
3/17	20,700	14½	13⅞	14¼	+ ⅜
3/18	Trading Halted				
3/21	Trading Halted				
3/22	104,700	16	15¾	16	+1⅞•
3/23	81,600	16⅛	15⅞	16	.....
3/24	47,300	16	15¾	15⅞	− ⅛
3/25	28,200	16	15⅝	15¾	− ⅛
3/28	34,400	15⅞	15¾	15⅞	+ ⅛
3/29	57,300	15⅞	15¼	15⅜	− ½
3/30	55,300	15¾	14¾	15¼	− ⅛
3/31	6,800	15⅜	14¾	15⅜	+ ⅛
4/1	9,500	15⅜	15¼	15⅜	.....
4/4	10,400	15¼	14½	14¾	− ⅝
4/5	11,300	15	14½	14¾	.....
4/6	26,100	14¾	14⅜	14¾	.....

• ex-dividend.

PLAINTIFF'S EXHIBIT 12:

Comparison of basic requirements of various state takeover laws compiled by Professor Leon Lebowitz

STATE	% BENEFICIAL OWNERSHIP TRIGGERING STATUTE	TARGET COMPANIES COVERED	PRE-TENDER OFFER PURCHASES	EXEMPTIONS: OFFER TO LESS THAN MIN. NO.	EXEMPTIONS: ACQUISITIONS LESS THAN 2%	EXEMPTIONS: FRIENDLY TAKE-OVER	EXEMPTIONS: NO INTENT TO CONTROL	EXEMPTIONS: EXCHANGE OFFER	EXEMPTIONS: NOT REG. $12 EXC. ACT
Pa.	5%	1) Incorp. or 2) princ. place of bus. & sub. assets.		< 25 within preceding 12 months	X	X	X		< 100 shareholders, < $1 million assets
Colo.	10%	Incorp. or princ. place of business.			X		X	X	X
N.Y.	5%	Incorp. or princ. place of bus. & subst. assets.		< 50	X	X	X	X	X
Del.	5%	Incorp. in Del.		< 30 holders					
Kan.	20%	Incorp. or princ. place of bus. & subst. assets. Must have purpose of change of control or mgmt.	May not make takeover bid offer if off'r has acquired > 2% of securities unless off'r has made public anno't prev. of intent to change control.	< 15		X	X		
Ky.	5%	Incorp. or have princ. place of bus. and subst. assets	No off'r can make bid if he owns 5% of stock any of which purchased in last 12 mos. if he failed to publicly announce intention to gain control when he purchased stock.	< 10		X			
Utah	5%	Incorp. or princ. place of business			X	X	X		X
Tenn.	10%	Incorp. or princ. place of bus., which has subst. assets.	No offer if off'r owns 5% of co. & has purchased stock in last year unless he made public announcement of intention.	Isolated--sole acct of off'r good faith 15		X		X	< 50 holders

STATE	% BENEFICIAL OWNERSHIP TRIGGERING STATUTE	TARGET COMPANIES COVERED	PRE-TENDER OFFER PURCHASES	EXEMPTIONS					
				OFFER TO LESS THAN MIN. NO.	ACQUISITIONS LESS THAN 2%	FRIENDLY TAKE-OVER	NO INTENT TO CONTROL	EXCHANGE OFFER	NOT REG. §12 EXC. ACT
S.D.	10%	Incorp. or princ. place of bus. or subst. assets	If more than 10% acquired must file purpose w/i 10 days; identity & background source & amt of funds--if borrowed. Change in structure if control sought. No. of shares, material terms of agreemt with respect to shares. May file 13(d) in its place.	No more than 10 people withi. 12 mos.	X	X	X	X	
Ind.	10%	Incorp. or has princ. office or subst. assets.		Offer to < 50 owners	X	X	X		
Idaho	5%	Incorp. or princ. office, which has subst. assets.		Offer to not more than 10	X	X		X	< 100 stockholders
Alaska	5%	Incorp. or has princ. office and subst. assets.				X			Co. with < 100 stockholders
Nevada	10%	Incorp.							
Conn.	10%	Incorp. or with princ. exec. offices or maj. of bus. oprns.		100	X		X	X	< 100 stockholders
Wis.	5%	Incorp. or has princ. office, which has subst. assets, whose equity sec. are reg'd, & which may be involved in take-over relating to any class of its securities.		10, during 12-month period.	X	X		If offer is exempt from reg. under '33 Act.	< 100 stockholders

STATE	% BENEFICIAL OWNERSHIP TRIGGERING STATUTE	TARGET COMPANIES COVERED	PRE-TENDER OFFER PURCHASES	EXEMPTIONS					
				OFFER TO LESS THAN MIN. NO.	ACQUISITIONS LESS THAN 2%	FRIENDLY TAKE-OVER	NO INTENT TO CONTROL	EXCHANGE OFFER	NOT REG. §12 EXC. ACT
Mass.	10%	Incorp. or princ. place of business	Must be less than 5%.		X	X			< 25
Mich.	5%	Incorp. or princ. place of business		15 during 12-month period	X	X			100
Md.	5%	1) Incorp.; 2) Primary place of bus. or subst. portion of assets		25	X	X	X	X	< 100
La.	5%	Incorp. or princ. place of bus. or subst. portion of assets or more than 50% of its employees, & has aggregate assets w/i & w/o state of $50 million.			X	X	X		co. w/less than 100 owners
Minn.	10%	1) Incorp. or princ. place of bus. 2) Subst. portion of assets in state 3) Equity shares of any class are or have been w/i 2 yrs. registered in Minn.	May not file a regist. statement for proposed take-over offer until 60 days after ownership stm't filed.			X	X	X	
Ohio	10%	Incorp. or princ. place of bus. & subst. assets.	If 5% of shares obtained in past 12 mos. w/o giving notice of intent to acquire control, then no take-over bid for 12 months.	From not more than 50 persons		X		X	
Va.	10%	Incorp. & doing bus. in Va.							
Hawaii	10%	Incorp. & doing bus. in Hawaii.							< 100 shareholder & $1 million in assets.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Pa.	20 days--reg. stmt. sent to Commission; target & local bargaining representative. Publicly disclose offering price, etc.	By Commissioner or at request of target co. w/i 30 days; determination w/i 30 days after close of hearings.	Copies of all material used in offer, background & identity of all persons, source & amount of funds, a description of material terms of any financing arrangements, plans for change in corporate structure, # of shares owned by off'r, contracts which off'r has w/respect to shares of target-joint ventures, withholding of proxies, etc. *Particulars as to contracts of employment purchase of services or property from officers/directors of target. *Corp. info on off'r. Legal matters involving antitrust, equal opportunity & environmental matters are material.
Colo.	10 days prior to offer. *No waiting period after filing if friendly t-o. 5 day waiting period after amendment. *Note: Waiting period does not preclude publishing details of tender offer. Recommendations to accept/reject to be filed with Commissioner.	No provision.	Information required by 13(d) of 1934 Act.
N.Y.	20 days	Hearing scheduled w/i 15 days of filing of reg. stmt., held w/i 40 days determination w/i 30 days of completion of hearing.	Copies of all materials, identity & background of all persons, source & amount of funds, liquidation plans or change in corp. structure, # of shares beneficially owned, contracts w/respect to equity shares, i.e. proxies, puts & calls, etc., complete corp. info.
Del.	Not less than 20 days nor more than 60 days file notice with target corporation. *Provision for competing off'r--may make offer for securities in same class as in orig. offer at or after date that orig. off'r is allowed to make offer.	None.	To be furnished to corp. name, address of off'r & its directors & officers, type of securities & price offered, duration of offer, date on which off'r may first purchase securities, amt. of securities to be purchased, whether off'r accepts all shares tendered or conditions upon which acceptance is made, # of shares owned beneficially by off'r, contracts w/respect to ownership, voting rights of securities of target, copies of balance sheet of offeror.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Kan.	30 day disclosure	Target co. may request w/i 15 days; Commissioner may order	Copies of materials, identity & background of persons, source & amt. of funds, plans for change in corp. structure or personnel policies, # of shares beneficially owned by offeror. Contracts w/respect to securities of target, complete corp. info for 5 years.
Ky.	20 days	Target can request hearing w/i 40 days; adjudicated w/i 60 days.	Copies of all materials, identity & background of all persons source & amt of funds, # of shares offeror beneficially owns--complete info on corp. organization.
Utah	20 days	Commission calls hearing w/i 10 days; take-over effective 7 days after Commission's determination. Hearing held w/i 20 days, completed w/i 30 days; determination w/i 10 days after hearing. *Review w/S.Ct.	Identity & background of persons, source & amt of funds--if borrowed describe transaction, plans for change in corp. structure, # of shares beneficially owned, contracts w/respect to shares, info on corp. organization, financial statements, copies of take-over offer. May file copies of material filed with SEC in lieu of above.
Tenn.	Must file reg. statement; 10 day waiting period.	w/i 20 days; w/i 30 days Comm. may deny effectiveness of offer--judicial review.	Identity & background of persons, source & amt of funds, any plans to change corp. structure, mgmt or personnel, # of shares beneficially owned; contract w/respect to securities between offeror & target--voting proxies, etc. Corporate information--financial stmts for 3 years. Copy of all mat'l.
S.D.	May not file reg. stmt. for 60 days if ownership stmt delinquent. Take-over offer effective after 10 days.	Scheduled by Comm., target or 10% shareholder w/i 20 days. Director may deny registration.	All of info required for 10% acquisition stmt. Copies of solicitation materials; complete corporate information.
Ind.	20 days notice; Comm'r may accelerate effectiveness.	Dep't may hold hearing--target may request w/i 20 days; determination w/i 60 days.	Description of offeror (3 yrs activities); biography if offeror is individual; description of funds, liquidation plans, # of shares beneficially owned, prior agreements.
Idaho	Must file w/i 10 days after acquisition of 5%. Must file reg. stmt for take-over.	Becomes effective when approved by director. Direct. or target w/i 20 days.	Identity & background of persons buying stock, description of funds, liquidation plans, prior ownership.
Alaska	20 days notice	w/i 20 days by dep't. adjudicate w/i 30 days	Names & addresses of associates, terms of offer, description of funds, liquidation plans, shares owned prior to offer, prior agreements, description of offeror.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Nev.	10 days in advance	File w/target co.--not state securities.	Name, address, business experience, source & amt of funds, and if borrowed, plans to liquidate, # of presently owned shares; contracts for joint ventures, proxies, etc., all materials used in solicitation. To be filed w/target no later than time copies are first published.
Conn.	Offer effective 10 days after filing regis. statement.	If requested by target co. or holders of 10% stock, held within 30 days of filing.	Copies of all materials. Identity & background of all persons for whom offer is made. Source of funds. Liquidation plans. # of shares of target co. held. Prior agreements or contracts w/respect to equities. Amount of material interest in target co. involved in deal within last 3 years; prior agreements w/r individuals. Latest annual report & proxy stmts of offeror. Intended commencement date of offer.
Wisc.	Offer effective 10 days after filing regis. statement.	If requested by target co., held within 20 days, report w/i 30 days.	Identity & background of all persons, source & amt of funds. Liquidation plans. # of shares held. Agreement w/respect to securities. Materials, description of operations last 3 years. Description of individual.
Mass.	30 days after public announcement of terms.	If requested by target w/i 15 days; adjudication w/i 90 days.	Materials identity & background of people. Source of funds; liquidation plans; # shares held; agreements w/respect to securities. Organization and operations of offeror. Description of court proceedings involving offer. How many offers made within 5 years. Felony record of officers, and if involved in judgment concerning antitrust, fair employment, securities transactions, environmental protection.
Mich.	10 days	Within 20 days regis. is filed.	Materials, description of corp., inc. changes in last 5 yrs. Background of individual, inc. business during last 5 yrs. Source of funds; liquidation plans; # shares owned. Prior agreements w/respect to securities and individuals. 3 cps offer. Other info administrator requests.
Md.	20 days		Name & address; # of shares to be purchased; duration of offer. If will all or any part of shares offered. Conditions of acceptance; any contractual terms; info required by SEC.
La.	Effective 20 days after filing; publicly announce offering & notify target co. Comm'r may accelerate.	Hearing ordered by Comm'r or request of target co.; held w/i 20 days of hearing notice; determination w/i 60 days after conclusion of hearing.	Identity & material info concerning offeror--comprehensive corp. info; source & amt of funds; description of transaction involving borrowed funds; plans for any change in corp. structure, mgmt or personnel; # or shares beneficially owned; contracts w/respect to equity shares, info as to contracts w/any officer/director of target w/respect to purchase by offeror other than by tender offer or retention of position or w/respect to recommendation; favorable to take-over bid; material to be furnished to offeree.

STATE	ADVANCE NOTICE REQUIREMENT	HEARINGS	INFORMATION REQUIRED
Minn.	File acquisition stmt 10 days after acquiring 10%. Registration stmt for take-over bid filed--effective in 10 days.	At request of target or Comm'r w/i 20 days of filing; determination w/i 20 days after hearing closed.	Info for 10% acquisition of shares; identity & background, source & amt of funds--arrangements for borrowed funds, plans for corp. structure, mgmt or personnel, # of shares owned, material terms of contract w/respect to equity shares. May file 13(d) stmt in lieu of above. Registration stmt--info above, copies of materials, corp. info on offeror.
Ohio	Publicly announce & send materials 20 days in advance.	On request of target or ordered by Division w/i 40 days of filing w/i 60 days of filing	Info required--copies of all materials, identity & background of persons, source & amt of funds, plans to change corp. structure, personnel, employment, # of shares beneficially owned, contract w/respect to shares--proxies, etc., complete corp. info.
Va.	20 days	Hearing ordered w/i 10 days of filing by Comm. or target; hearing w/i 40 days.	Name, address, business experience, terms & conditions of take-over bid, plans for liquidation, source & amt of funds. complete info as to organization and operations of offeror; copies of all materials.
Hawaii	60 days	On order of Comm'r--at request of target.	Names & addresses of offerors; terms of offer, description of funds, liquidation plans, shares owned prior to offer, any agreements w/respect to shares, description of offer.

STATE	REQUIRED OFFERING PERIOD & WITHDRAWAL PRIVILEGES	PRO RATA ACCEPTANCE	INJUNCTIVE RELIEF	ANTI-FRAUD PROVISION	CIVIL LIABILITY	CRIMINAL LIABILITY
Pa.	Withdrawal--before 7 days--after 60 days	Pro rata acceptance of share w/i 10 dys	Comm'n cease & desist order---court injunction	None.	Recission or damages--control persons & broker; dealers jointly & severally liable.	Wilful violation of info; filing & solicitation materials fine* imprisonment
Colo.	Shares deposited for not less than 15 days; withdrawal w/i 15 days & after 35	Pro rata; no time limit	X	None.	Liability for untrue stmt or omission of mat'l fact, recission or damages--all involved jointly & severally liable.	No provision.
N.Y.	No provision.	No provision.	X	X	No express provision.	Wilful violation is Class A misdemeanor.
Del.	Open at least 20 days; withdrawal during period offer is open.	Pro rata acceptance entire period.	Exclusive jurisdiction w/chancery court.	None.	Court may reward relief.	No provision.
Kan.	No provision.	Pro rata acceptance of shares w/i 10 days.	No provision	None.	Subject to liabilities in K.S.A. 17-1267.	Penalties imposed by another statute.
Ky.	No provision.	Pro rata w/i 10 days.	No provision.	Director of securities may prescribe rules for defining fraudulent practices.	Offeree entitled to remedies applicable to purchaser. K.R.S. 292.991; offeror subj. to penalties applicable to seller.	No provision.
Utah	Shares deposited not less than 15 days or more than 60 days.	Pro rata w/i 10 days.	Comm'r may issue a stoporder.	X	Liable for untrue stmt or misleading fact--recover security or damages; participants are jointly & severally liable.	Wilful violation is misdemeanor.
Tenn.	Withdrawal w/i 7 days--after 60 days.	Pro rata acceptance w/i 10 days.	X	X Statute defines acts.	Liability for false stmt of mat'l fact--recission, damages figured by statute.	Knowingly violate act misdemeanor 30-100 days jail, $50-2500 fine; knowingly engage in fraudulent misrepresentation--felony.

STATE	REQUIRED OFFERING PERIOD & WITHDRAWAL PRIVILEGES	PRO RATA ACCEPTANCE	INJUNCTIVE RELIEF	ANTI-FRAUD PROVISION	CIVIL LIABILITY	CRIMINAL LIABILITY
S.D.	Withdrawal w/i 7 days & after 60 days	Pro rata acceptance w/i 10 days	Cease & desist order by Comm'n; court injunction	X	Express provision; recovery of security; measure of damages.	Fine & imprisonment, $5000 - 5 years.
Alaska	Shares tendered for not less than 21 days nor more than 35 days.	Pro rata acceptance for entire time.	X	X	Express provision; recover shares, dividends or damages--att'ys fees.	Violation of act up to 3 years & $5000.
Idaho	Withdrawal up to 7 days, after 60 days.	Pro rata acceptance within 10 days.	X	X	Express provision; may sue to recover security or damgs.	$5000 or 3 years for wilful violation.
Ind.	Withdrawal up to 3 days prior to termination.	Pro rata acceptance for entire time.	X	None.	Express provision recover shares or damages, att'ys fees.	Failure to file disclosure stmt, 1 yr & $500; misrepresentation of material fact 1-5 yrs, $10,000; publish false facts 1-5 yrs, $10,000.
Nev.	Shares may be deposited not less than 21 days nor more than 35 days.	Pro rata acceptance for entire time.	No provision.	X	Untrue stmt of mat'l fact, offerees may recover shares, dividends, interest, att'ys fees.	No provision.
Conn.	Withdrawal up to 3rd day prior to termination date.	Pro rata for entire period.	X	Comm'r may make rules defining fraud. prac.	No provision.	Fine $5000, up to 5 yrs in prison.
Wis.	Withdrawal w/i 7 days after offer becomes effective.	Pro rata acceptance within 10 days.	X	X	Express provision, excess of value on date of purchase or at present, whichever greatest.	$5000 fine, 5 yrs, or both.
Mass.	Up to 5 days of termination offer.	Must buy all shares tendered.	X	X	Express cause of action, recission or damages, lost income.	$5000 fine, 3 yrs, or both.
Mich.	No provision.	For entire period offer open.	X	None.	Recovery security plus lost income, reasonable attorneys' fees.	No provision.

STATE	REQUIRED OFFERING PERIOD & WITHDRAWAL PRIVILEGES	PRO RATA ACCEPTANCE	INJUNCTIVE RELIEF	ANTI-FRAUD PROVISION	CIVIL LIABILITY	CRIMINAL LIABILITY
Md.	Withdrawal w/i 7 days & after 60 days.	Pro rata acceptance w/i 10 days.	X	X	No provision.	No provision.
La.	No provision.	Entire period.	Sought by Comm'r, target co. or any record or beneficial owner.	X Fraudulent acts defined by statute.	Liab. for off'r, control persons & brpker-dealer. Recission, damages, atty's fees. Liab. to person who did not sell to off'r.	Failure to file--fine & imprisonment; knowingly misrepresents material fact, up to 5 yrs & $10,000.
Minn.	Withdrawal w/i 7 days or after 60 days.	Pro rata acceptance w/i 10 days.	Cease & desist order injunction.	X Statute defines fraudulent pracs.	Off'r, control persons & broker-dealer joint & several liab. Recission, dmgs.	Violation of act by offeror, $500 fine, imprisonment up to 5 years.
Ohio	Withdrawal w/i 7 days.	Pro rata w/i 10 days.	No provision.	None.	Off'r subject to liabilities & penalties; offeree entitled to remedies of purchaser.	No provision.
Va.	Deposit at least 21 days--not more than 35 days; withdrawal first 21 days--after 35 days.	Pro rata during deposit time.	X	X	Express cause of action--recover shares, dividends, attorneys' fees.	Fine only.
Hawaii	Deposit at least 21 days--not more than 35 days.		X	None.	Express cause of action--recover shares, dividends, attorneys' fees; also common law remedies.	Fine or imprisonment.

Transcript of March 30, 1977, TRO Hearing:

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405

[Title Omitted in Printing]

BE IT REMEMBERED that commencing on March 30th, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[2] APPEARANCES:

HON. IVAN IRWIN, JR. and
HON. A. B. CONANT, JR. and
HON. JAMES V. GREVELLE, JR. and
HON. ROBERT B. COUSINS, JR. and
HON. BRETT RINGLE
For the Plaintiff

HON. JAMES KAUFMAN
For the State of Idaho

HON. PETER HEISER, JR.
For the Defendant WAYNE L. KIDWELL

HON. DICKEE HOWARD GOODMAN
For the Defendant FRANCIS B. BURCH

HON. MARK MARTIN
For Sunshine Mining Corporation

HON. ROBERT JUCEAM
For Sunshine Mining Corporation

[3] PROCEEDINGS

MARCH 30, 1977

9:04 A.M.

• • •

Transcript of March 30, 1977, TRO hearing:

Statements by James P. Kaufman, Assistant Attorney General of Idaho

[25] • • •

[Mr. Kaufman:]

After three or four days of analysis of the papers filed with the State of Idaho, our administrator decided that not all of the facts had been materially disclosed. There were certain facts missing and there was a matter of an exchange of $200,000 made after the tender offer going back to former shareholders that upset the State of Idaho.

So, that prompted the State of Idaho to issue its letter of comment asking for this information.

THE COURT: When did he do that?

[26] MR. KAUFMAN: That was on Friday the 25th of March, I believe.

The Director further ordered that the tender offer be effectively delayed until this matter was cleared up.

We believe it is important that the activities of Great Western be stopped for the moment not only in Idaho but all over the country because there are, of course, public investors in other states and to prevent them from operating in Idaho but allowing them to go to the other states would seriously jeopardize the position of the Idaho shareholder.

Great Western has mentioned that it will accept up to two million shares from the shareholders. After that, it's first come, first serve basis. So, obviously, if they can go out of state, the Idaho shareholders will be left with virtually nothing.

THE COURT: Under your Act you can enjoin them from—

MR. KAUFMAN: That is correct, Your Honor. Under our Act we may summarily issue the order delaying the effective date of registration until such time as it has been materially dis- [27] closed. All we're interested in is seeing that the shareholders get a fair deal.

THE COURT: This was a letter of comment from the Director and what was the purpose for that letter?

MR. KAUFMAN: That is correct, Your Honor. That letter asked for certain items that our Administrator felt were missing. In that letter I believe we state—

THE COURT: That was addressed to Great Western here in Dallas?

MR. KAUFMAN: That is correct, that is one of their exhibits.

• • •

[29] • • •

THE COURT: I was curious as to whether or not the Director there reviewed the disclosures made under the Williams Act to see if they complied with the disclosure requirements under the Idaho law.

MR. KAUFMAN: Yes, Your Honor.

THE COURT: We didn't think that they did comply; is that correct?

[30] MR. KAUFMAN: Not by the Idaho disclosure requirements. We, of course, don't enforce the SEC disclosure requirements.

THE COURT: I understand, but you're interested in your stockholders there in Idaho obtaining full disclosure and I was curious as to whether or not Idaho felt that the disclosure under the Williams Act were sufficient to comply with the Idaho law.

MR. KAUFMAN: We do not, Your Honor.

THE COURT: You do not think so?

MR. KAUFMAN: No, sir.

THE COURT: Thank you.

MR. KAUFMAN: Anyway, we can file the letter of intent and the Order delaying effective registration pursuant to Idaho law, which allows a director to do this summarily until such time as requested disclosures are made.

Then, Monday morning—

THE COURT: The effect of the Order was to delay the registration in Idaho; is that correct, until this information was furnished?

MR. KAUFMAN: That is correct, Your Honor. Under the Idaho law, I believe that the registration was delayed anyway because it's not [31] effective until approved.

THE COURT: Let me ask you about the approval.

Are there any deadlines on the approval or is it just subject to the discretion of the appropriate regulatory agency there in Idaho?

MR. KAUFMAN: Your Honor, there's a twenty day deadline if the State or the target company wishes to call a hearing and have an independent hearing to decide the

merits of the matter or decide whether or not there's been full disclosure. The hearing must be held within twenty days of the filing. It's a requirement to prevent the states from bureaucratically delaying the proceedings.

We did not want the twenty day period to run until their filing with us was complete. In other words, our raiding company could just file with us a piece of paper and not tell us anything and then the twenty day period would run while we're going back and forth trying to get them to file something. So, we wanted to prevent that twenty day period from running on us until they filed with us everything that they feel was complete.

[32] We indicated to them that if they did not file that we would like to have this information as stated in our letter of comment in addition to what they had already filed.

If they did not want to give us that information then we were prepared to call for a hearing to see if the hearing officer could determine that material. If the hearing officer found that what they had disclosed was proper and Idaho was asking for too much, then so be it.

THE COURT: Now, assuming he's ruled the other way, what would be your remedy there in Idaho?

MR. KAUFMAN: Well, we could deny the offer if it was determined that the raiding company had not materially disclosed all of the essential terms of the tender offer and what they intended to do with the company after they took it over. The State of Idaho has the authority to deny it.

* * *

[35] * * *

THE COURT: How do you interpret this? It says, "The purchaser presently intends to commence the proposed offer as soon as practi- [36] cable after it becomes effective under the Idaho takeover law and the requirements of other state takeover laws, if any, which are applicable to the offer are met or it is approved by the company's board of directors."

MR. KAUFMAN: Well, Your Honor, of course, under the corporate takeover law, if it's approved by the board of directors of the company, then they're exempt from the law.

But also under our law and I think these other state laws, they cannot complete or make a tender offer until it's been approved. So, technically, they can't commence it until it's been approved. They sort of have to announce it to the target company and to the public shareholders, but they can't really commence until it's been approved.

They stated that they're going to come to Idaho. They have come to Idaho and filed this with us. They filed it with the SEC.

* * *

Transcript of March 30, 1977, TRO hearing:
Statements by Peter E. Heiser, Jr., Chief
Deputy Attorney General of Idaho

[40] * * *

But, Your Honor, we do have in Idaho some threshold problems.

I think in the first case, Your Honor will be able to understand from the four corners of the Complaint that

although Attorney General Kidwell of the State of Idaho is named as a party defendant, it's done on the basis of speculation that he might have to enforce the law rather than the fact that he has ever in this case done a thing.

THE COURT: He's done nothing up to this point?

MR. HEISER: That's correct. He's vacationing in Death Valley right now. He does not even know there is a case.

THE COURT: Let me ask you this, Mr. Heiser: What could he do?

MR. HEISER: He does have concurrent jurisdiction under the Takeover Act to take action [41] under the Idaho takeover law. He has jurisdiction to bring a court action.

THE COURT: To enforce the law?

MR. HEISER: Yes, sir.

* * *

[42] * * *

These people came to Idaho to submit themselves to the jurisdiction of the Idaho Department of Finance, to file a registration under [43] our take over law.

THE COURT: They had to do that.

MR. HEISER: They had to do that to comply with our law.

However, they did not have to do that if they wanted to challenge our law.

They could have very simply come up to Idaho to our Federal District Court and brought their action under the Williams Act for challenging the Williams Act conflict with our state law in Federal court. They did not have to com-

ply with our law if they wanted to challenge our law. They could have come up there and attacked it there.

THE COURT: How would they have challenged the New York-Maryland law?

MR. HEISER: They would have to go to New York and Maryland to do it.

* * *

[44] * * *

THE COURT: Let me ask you if you think that the Idaho laws would have any effect on Great Western here in Dallas whether they came up there or not? Let's assume they didn't come up to Idaho.

Do you think your law might have an effect on them here in Texas? They're headquartered here. They desire to make a tender offer.

MR. HEISER: If they made a tender offer and refused to comply with the Idaho law and did not make their tender offers in the State of Idaho, I don't see how we could assert extra-territorial jurisdiction on them. If they ignored Idaho, Idaho shareholders completely, we're out of the ballpark.

[45] THE COURT: Couldn't you sue them in Idaho and obtain jurisdiction over them there if they are making a tender offer to your stockholders?

MR. HEISER: Yes, then they would be transacting business in the State of Idaho.

THE COURT: Let me ask you to turn it around. You say you can't make a tender offer, you in Texas can't make a tender offer to our people in Idaho.

Do you think you're transacting business in Texas?

MR. HEISER: Absolutely not. We are telling the people in Texas that you cannot affect by your actions in

your tender offer the shareholders in Idaho and particularly under the circumstances here.

THE COURT: You're telling them they can't make a tender offer anywhere, in effect, aren't you, if you don't satisfy the Idaho—

MR. HEISER: If they don't satisfy the Idaho law that they cannot make a tender offer.

THE COURT: In New York or anywhere?

MR. HEISER: Yes.

THE COURT: All right. Do you think you're [46] having an effect, some effect on Great Western here in Dallas?

MR. HEISER: Certainly we are once they have somehow triggered our ability to assert jurisdiction over them.

THE COURT: I think they admit you'd have jurisdiction over them up there if they sent tender offers to the stockholders, wouldn't be much question in my mind.

So, you've got this threatened jurisdiction over them and now you've issued a letter sent a letter down here to to Dallas to them, I think last Friday, saying unless you comply with our disclosure requirement you're not going to be approved in Idaho.

Now, do you think all of this encompasses some effect of Idaho law on them, these Texas people?

MR. HEISER: Certainly it affects these Texas people, Your Honor.

* * *

[48] Now, do you stay that there's not minimal contacts?

MR. HEISER: We contend that there is not minimal contacts with the State of Texas that would subject the State of Idaho to the jurisdiction of this Court here. Cer-

tainly, we would have a different situation were this action brought in the State of Idaho.

THE COURT: Could the Attorney General initiate proceedings in Idaho without some request by Mr. McEldowney, Director of the Idaho Department of Finance?

MR. HEISER: We have a dual role in enforcing this. We can legally, yes. As a practical matter, no, won't be done except upon recommendation.

THE COURT: Legally, the Attorney General could initiate these on his own?

MR. HEISER: That is correct.

• • •

Transcript of March 30, 1977, TRO hearing:
Statements by Dickee Howard Goodman,
Assistant Attorney General of Maryland

[72] • • •

THE COURT: What action could you take, Ms. Goodman?

[73] MS. GOODMAN: Well, we could go into court and ask for an injunction if they have not filed under the Maryland takeover statute which would, in effect, preclude them from making the tender offer in Maryland.

THE COURT: What about making the tender offer outside the State of Maryland? Does your law encompass the jurisdiction of the state courts to do that, to restrain the tender offer because it's not being made to Maryland residents or Maryland stockholders?

MS. GOODMAN: Well, the Maryland Securities Act, no.

The Maryland takeover statutes provide that an offeror may not make a takeover offer involing the target company, et cetera, et cetera, at a time when an administrative or injunctive proceeding has been brought by the Commissioner against the offeror. It's a violation of our statute which seems to indicate to me in the event Maryland did take action there would be extra-territorial implications.

• • •

Transcript of April 8, 1977, jurisdiction and venue hearing:

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405

[Title Omitted in Printing]

BE IT REMEMBERED that commencing on April 8th, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[2] HON. A. B. CONANT, JR. and
HON. JAMES V. GREVELLE, JR. and
HON. BRETT RINGLE and
HON. DREW HEARD and
HON. BRETT RINGLE
For the Plaintiff;

HON. JAMES KAUFMAN
and
HON. PETER HEISER, JR.
For State of Idaho;

HON. DICKEE HOWARD GOODMAN
For Defendant FRANCIS B. BURCH

HON. AMY JUVILER and
HON. WILLIAM S. DUGAN
For State of New York

Transcript of April 8, 1977, jurisdiction and venue hearing:

Stipulations

[03] * * *

MR. CONANT: It has been stipulated by and between the parties that the Defendants Kidwell and McEldowney in their personal capacities are citizens of the State of Idaho. That the Defendant Lefkowitz in his personal capacity is a citizen of the State of New York. That the Defendant Burch and Polovoy in their personal capacities are citizens of the State of Maryland. That none of the [04] Defendants are citizens of other states.

It has further been stipulated that there is an amount of at least $10,000.00 in controversy between Plaintiff and these Defendants.

It has further been stipulated that the Order of the United States District Court for the Southern District of New York entered on April 5th, 1977 staying the depositions of certain employees of the office of the Attorney General in New York, together with an Affidavit seeking that stay may be admitted.

Your Honor, we have marked such Order and Affidavit as Plaintiff's Exhibit 2 in light of the Plaintiff's Exhibit 1 which was introduced at the prior hearing. I am sorry I don't have a better copy. It's a tele copy version of that Order.

THE COURT: That's the Order?

MR. CONANT: Yes, sir, the Order and the Affdivit submitted with it.

THE COURT: 2 will be admitted.

[05] MR. CONANT: The parties have stipulated as to the admissibility of the 10K of Sunshine Mining Com-

pany with the following proviso; that the Idaho, Maryland and New York Defendants do not consider the statements made in the 10K determinative of the jurisdiction an applicability of their respective state take-over acts. By that I understand them to mean that they do not understand the 10K or do not concede that the 10K establishes Sunshine's principal place of business or where it may have substantial assets.

THE COURT: Have you got that exhibit?

MR. CONANT: Yes, Your Honor, we do.

THE COURT: Have you marked it?

MR. CONANT: Your Honor, this is the—we have now marked Plaintiff's Exhibit 3, the Sunshine Mining Company Form 10K for the fiscal year ended December 31, 1975, which was filed with the SEC on March 30, 1976.

(Plaintiff's Exhibit Number 3
was marked for identification.)

I believe there is a later 10K which has been filed just within the last few days for Sunshine but I don't believe any of the Defendants as yet have a copy of that.

[06] THE COURT: All right. As stipulated, 3 will be admitted.

MR. CONANT: Your Honor, it has further been stipulated that Sunshine Mining Company is a company having a class of securities for the tender offer for which—over the tender offer for which the Williams Act applies. Your Honor, it has further been stipulated between the Idaho Defendants and the Plaintiff that the Idaho Order, Administrative Order, was attached as Exhibit C to the Complaint and a copy of which I believe was given to the Court

at the prior hearing, but according to the transcript was not marked as an exhibit. Correct me if I'm wrong. I could better refer to it—

MR. HEISER: I believe that they were marked but with the markings that you used on your Complaint so they were not marked as exhibits for the record.

MR. CONANT: All right. Then, Your Honor, just to straighten out the record, we'll mark and introduce that item.

THE COURT: Number 4.

(Plaintiff's Exhibit Number 4
was marked for identification.)

[07] MR. CONANT: All right.

(Plaintiff's Exhibit Number 5
was marked for identification.)

This stipulation then is that the Order which we have now marked as Plaintiff's Exhibit 5, and I'll refer to 4 in a minute, which provides among other things for hearing after filing of a registration statement, was issued without notice or hearing as provided by the Act. GWU, after its issuance and prior to the filing of this Act, does not ask to be heard. GWU has not made any of the disclosure or supplied any of the information used in the Order or the Idaho Comment Letter which we have now marked and tendered to the Court as Plaintiff's Exhibit Number 4.

THE COURT: Did that letter accompany the Order?

MR. CONANT: They were dated the same day and I believe it did accompany the Order. Yes, Your Honor.

THE COURT: If this the letter that was mailed to Great Western?

MR. CONANT: Excuse me, sir?

THE COURT: Was this the letter that was mailed to Great Western?

[08] MR. CONANT: Yes, Your Honor. First telecopied and subsequently mailed.

THE COURT: All right.

[09] MR. CONANT: Continuing with the stipulations between the Idaho Defendants and GWU, that GWU has principal executive offices in Dallas, Texas.

GWU's representatives came into Idaho on March 21, 1977, and in person filed with the Idaho Director of Finance a registration statement under the Idaho Takeover Act and conferred with the Director's staff. The statement filed by GWU listed GWU's address as in Dallas, Texas.

The letter of the office of the Idaho Director of Finance dated March 25th, 1977, which is now Exhibit 4—

THE COURT: That's No. 4.

MR. CONANT: —was addressed to Steven Metzger and was addressed to GWU in Dallas at GWU's request.

GWU made no reservation of rights with respect to or has received any claim of validity in the Idaho Act of the Schedule 13(D) or statement in the filing with the Idaho Director.

GWU has not sought any determination from Idaho State Courts or agencies with respect to the validity or constitutionality of the Idaho Act. GWU has not brought or sought to bring this action in any Federal Court in Idaho, New York or Maryland.

[10] Those stipulations between the Idaho Defendants and GWU were made without prejudice to arguments concerning relevance and materiality of the stipulations.

THE COURT: All right.

MR. CONANT: Your Honor, we on the break sought to arrive at other stipulations, but for a variety of reasons were unable to do so. I think that concludes the stipulations between the parties.

THE COURT: Is that so stipulated? Let me ask Idaho first. Mr. Heiser?

MR. HEISER: Yes, Your Honor.

THE COURT: New York?

MS. JUVILER: I have two comments. They have to be clarified. While we conceded that there would be $10,000.00 in controversy, it was stipulated only if there was determined to be a controversy between the parties.

THE COURT: All right. That will be added to the stipulation.

MS. JUVILER: The stipulation as far as the 10(k) in addition to the fact it did not determine the jurisdictional facts as far as the New York Statute was concerned, we also stipulated it in [11] only as to its relevance to jurisdictional facts such as where the locale of the assets and activities of Sunshine Mining were.

THE COURT: All right. Thank you.

Maryland?

MS. GOODMAN: The stipulation is agreed to.

• • •

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of Milton G. Strom, witness on behalf of Plaintiff—Direct examination

[19] • • •

MILTON STROM,

called as a witness by the Plaintiff, being first duly sworn testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q Will you state your full name, please, sir?

A Milton G. Strom.

Q Mr. Strom, how are you employed?

A I'm a partner in the New York law firm of Skadden, Arps, Slate, Meagher and Flom.

THE COURT: Give us that slower, will you please?

THE WITNESS: Skadden, Arps, Slate, Meagher, which is spelled, by the way, (spelling) M-e-a-g-h-e-r, and Flom, (spelling) F-l-o-m.

THE COURT: Proceed.

[20] Q (By Mr. Conant) Are you licensed to practice in New York, Mr. Strom?

A Yes.

Q Are you licensed to practice elsewhere?

A No.

Q You and your firm acted as Special Counsel for Great Western United Corporation in respect to its proposed tender offer for shares of Sunshine Mining Company?

A Yes, sir, yes, we have.

Q In connection with that employment have you had occasion to discuss with the New York Attorney General's office the question of whether of not the New York State Take-Over Act would apply to the tender offer of Great Western?

A I have had a couple, a number of phone calls with the New York Attorney General's office.

Q All right, sir. Was the general subject matter of those telephone calls whether or not New York would assert jurisdiction?

MS. JUVILER: Object to that question as leading.

THE COURT: As being leading?

MS. JUVILER: Yes, Your Honor.

THE COURT: I think it is leading. Sustained.

[21] MR. CONANT: All right.

Q (By Mr. Conant) What was the nature of those telephone calls, Mr. Strom?

A Well, as I recall there were a number of preliminary and sort of mechanical phone calls which would have been on Monday and Tuesday which would have been March 21 and March 22. We had—our firm had submitted a memorandum to the Attorney General and we had concluded that there was not jurisdiction. I had been speaking with, and other members of my firm had been speaking with Mr. Martin Weber as to when we could come down and see the Attorney General after they had finished reading the memorandum.

Q All right.

MRS. JUVILER: Object to that answer in the following respect, Your Honor. The characterization of telephone calls as mechanical. I object to the hearsay as to

other members of my firm had been speaking to persons in the Attorney General's office, and the subject matter of other people's conversation, and I object to the characterization that the law firm in presenting a brief had itself concluded that there was no jurisdiction rather than they presented the argument on behalf of their client; that their [22] client claimed there was no jurisdiction.

THE COURT: I'll sustain the last portion of your objection, the conclusion on the part of the law firm, but otherwise it would be overruled.

MRS. JUVILER: May I have an exception?

THE COURT: Yes. Everybody has an automatic exception in the Court's actions if they feel that they're prejudiced by the Court's action. Thank you. Go ahead.

Q (By Mr. Conant) Mr. Strom, the documents that your firm had presented, had it taken the position that the New York State Take-Over Act did not apply to the Great Western Tender Offer?

A That's correct.

Q Were your personal conversations with the office of the New York Attorney General's office, New York Attorney General, with Mr. Weber?

A Yes.

THE COURT: When did you talk with him now, approximately?

THE WITNESS: I believe on Monday and Tuesday of that week, which would be March 21 and March 22. I had a brief conversation with Mr. Weber as—solely for the purpose of seeing when we might be able to see either him or someone in the Attorney [23] General's office.

Q (By Mr. Conant) All right. Did you speak with Mr. Weber after those two phone calls?

A The afternoon of March 24 I received a phone call after the phone call was initially directed to my partner, Mr. Pirie, who was out of the office, and the phone call was transferred to me. The phone call was from Mr. Weber. Mr. Weber informed me that—I don't remember—

THE COURT: He's just really asked if you had—just asked if you had a conversation. That was the 24th?

THE WITNESS: That was the afternoon of the 24th.

THE COURT: Thank you.

Q (By Mr. Conant) And what did Mr. Weber say to you in that telephone conversation?

A Mr. Weber said that his office either, I don't remember his exact language, but it had either concluded or believed that there was jurisdiction under the New York Security Take-Over Disclosure Act over the proposed Tender Offer by Great Western for Sunshine. I went on to—he went on to state that they recommended that the registration statement which would be required by that statute be filed as soon as possible [24] and that the Attorney General's office had no intention of unduly delaying the offer. He went on to state that it was unlikely that the Attorney General's office would conduct a hearing. He said he also thought it was unlikely that they would conduct an investigation but that perhaps that was a little more likely than here. I objected to the assertion of jurisdiction. That's—I did not think it was appropriate under the circumstances. I asked him the basis for the jurisdiction. He would not tell me, and the conversation terminated.

Q (By Mr. Conant) Mr. Strom, do you have any notes made contemporaneously with that telephone conversation?

A Yes. It's my general practice—

THE COURT: You do have some notes?

THE WITNESS: Yes, I do.

THE COURT: He does.

Q (By Mr. Conant) And do you have those with you?

A Yes, I do.

THE COURT: 6 is your next one. He's got a 5. 5 is the Idaho Order and the letter is 4.

(Plaintiff's Exhibit Number 6
was marked for identification.)

Q (By Mr. Conant) Mr. Strom, I hand you what [25] I've now marked as Plaintiff's Exhibit 6 and ask whether this is the notes to which you referred?

A Yes.

Q These are notes made by you?

A These are notes made by me during the course of my conversation with Mr. Weber on the afternoon of March 24.

Q All right.

MR. CONANT: Your Honor, we offer Plaintiff's—

THE COURT: You've used those to refresh your memory here today?

THE WITNESS: Yes.

THE COURT: Thank you. Go ahead.

MR. CONANT: Your Honor, we offer Plaintiff's Exhibit 6.

MS. JUVILER: Your Honor, I'd like to voir dire as to where these notes were kept between March 24 and the present time.

THE COURT: Proceed.

VOIR DIRE EXAMINATION

BY MS. JUVILER:

Q Can you describe where you kept this note, Mr. Strom?

A That note was kept with my other papers on [26] this—relating to this matter.

Q Where was that, Mr. Strom?

A It was in my office and in my brief case.

Q Where did you keep this note in your office?

A It was kept on top of my desk in a pile with various other documents relating to this matter.

Q There is no date on this, on this note. How did you know that it was made on March 24th?

A You're right. There is no date on the note. But that was the conversation that I had with Mr. Weber on the 24th, and you will just have to take my word for it that it was on the 24th.

Q Do I understand you to say, then, that you didn't need these notes to refresh your recollection because these notes told you this is the conversation I had on the 24th? You remember the conversation without referring to the notes, is that correct?

A Well, I remember the conversation without referring to the notes but I did use the notes to refresh my recollection. I can't say that I remember one hundred percent of the conversation without having reference to the notes.

MS. JUVILER: We have no objection to the—to this being offered.

THE COURT: All right. Anyone else object? [27] We'll admit it if there are not other objections.

MR. HEISER: No objection.

THE COURT: Thank you.

MS. JUVILER: Your Honor, may I have leave to make a copy of that exhibit or any other that we don't have?

THE COURT: Yes. You're entitled to a copy of all those exhibits and particularly this one. The Rules entitle you to a copy of anything that he uses to refresh his memory.

[28] MR. CONANT: Your Honor, this is a very brief note, and just to remove any questions about whether any of us can read Mr. Strom's writing, may I ask him to read this for the record?

THE COURT: I think the Rules provide the note itself is not admissible in evidence, but it may be read.

MR. CONANT: Okay.

Q. (By Mr. Conant) Would you read the note to us, Mr. Strom?

MS. JUVILER: May I look over his shoulder as he reads it, Your Honor?

THE COURT: Yes, you may, then look over his shoulder.

THE WITNESS: Right shoulder or left shoulder?

A. This is on a note pad that I generally use for making notes of this kind. It says at the top, "From Milton G. Strom." There is two double lines below that. It says, "To."

Then there was the words "Martin Weber." Then there is a line. Below that it says, "There is jur," (spelling) J-U-R. Below that it says, "Time table—file as soon as possible—."

Then there is a little squiggle which I use to represent the word "not," so that would read "Not [29] intend to hold it up." That is underlined. Below that it says,, "Public hearing," there is another little squiggle which means not, "not likely." The last two words are underlined.

Below that there is the word "Fee," which in my shorthand means "could." That reads "Could conduct an investig," which is short for "investigation."

There is a dash. Again there is a little squiggle which means "not." It says, "Not likely but more likely."

That's the extent of the notes.

Q. (By Mr. Conant) Mr. Strom, since contacting the New York Attorney General's office have you subsequently heard, indirectly, by rumor or otherwise that perhaps the New York Attorney General's office has not decided whether or not to take jurisdiction?

A. I have had no direct conversations with the Attorney General's office since that time. However, I have heard—

MS. JUVILER: I object, Your Honor.

THE COURT: What is the basis of your objection?

MS. JUVILER: It's that it is hearsay.

THE COURT: I'll sustain it.

Q. (By Mr. Conant) Have you had any direct [30] contact with anyone from the New York Attorney General's office stating that the New York Attorney General's office would not take jurisdiction under its State Takeover Act?

A. Excuse me, have I had conversation with whom?

Q. With anyone at the New York Attorney General's office to the effect that that office would not take jurisdiction under the State Takeover Act?

A. No.

MR. CONANT: Pass the witness.

THE COURT: Cross exam, Mr. Heiser?

MR. HEISER: None from Idaho.

* * *

Transcript of April 8, 1977, jurisdiction and venue hearing:

Deposition testimony of Norman Polovoy, witness on behalf of Plaintiff — Direct examination

[46] * * *

MR. CONANT: Your Honor, this was a deposition of Mr. Polovoy taken on April 5, 2:15 p.m., at [47] 1000 Maryland National Bank Building in Baltimore, Maryland. Page 4, line 7, questioning was by Mr. Rule of my office.

"I would also state that Mr. Polovoy—correct me if I pronounce your name wrong—is appearing here by agreement today.

ANSWER: Certainly.

QUESTION: Mr. Polovoy, would you please state your full name for the record?

ANSWER: Norman Polovoy.

Going to line 17.

"QUESTION: What is your occupation, Mr. Polovoy?

ANSWER: I am an attorney and presently occupy the position of State Securities Commissioner.

Going to Page 5, Line 18.

THE COURT: Where did you end off there?

MR. CONANT: That went to, excuse me, Your Honor, that went to Line 19, page 4. The first quotation did. Next is page 5, line 18.

"In your capacity as the Commissioner of Securities, are you empowered with the right to administer and enforce the Maryland Corporate Take-Over Law?

ANSWER: To the extent provided for by [48] statute, yes, with the aid and assistance of the Courts where required. I'm not trying to dodge your question, I'm just trying to say yes, obviously with the Court's sanctions, where necessary."

On page 12—

THE COURT: Where did you end off there?

MR. CONANT: That was—

THE COURT: Page 6?

MR. CONANT: Page 6, line 5.

THE COURT: Give us the ending place as well, Mr. Conant.

MR. CONANT: All right, sir. Next beginning at page 12, line 21,—with me, Ms. Goodman?

MS. GOODMAN: Yes, sir.

MR. CONANT: "Mr. Polovoy, have you been able to determine whether or not the proposed Great Western Tender Offer shares of Sunshine Mining Company comes within the jurisdiction of the State of Maryland and the Maryland Corporate Take-Over Law?

ANSWER: No, I have not been able to determine that.

QUESTION: And you have not been able to make that determination both after reading the [49] position papers at Great Western and Sunshine Mining?

ANSWER: Yes, there was no evidence of the alleged facts contained in the statement given to me by Great Western nor the statement given to me by representatives

of Sunshine and from those two statements I have not been able to make any determination.

QUESTION: Is it a true statement, Mr. Polovoy, that you have stated an intention to call a hearing to determine the jurisdiction of the Maryland Statute?

ANSWER: No, that is not. I have indicated to both parties that I would be willing to have a hearing if any party requested it on the jurisdictional issue, whether or not Maryland has jurisdiction, but on my own volition I have not at any time indicated that I intended calling a hearing."

That took us, Your Honor, to page 14, line 1. Moving to page 19, beginning at line 3:

"QUESTION: Yes, sir. Does the Maryland Corporate Take-Over Law apply to a friendly tender offer, that is, a tender offer in which it is approved by incumbent management?

[50] ANSWER: I have just been referred to Section 11901, sub-section H which deals with the definition of a take-over offer, sub-paragraph 2-V in which it would appear that the take-over statute would not be applicable if the offer is made to all stockholders on substantial equal terms and then it goes on. Also, if the target company, if the offer to the target company acting through its Board of Directors recommends acceptance to its stockholders. That would seem to indicate that it is not applicable to a so-called friendly take-over offer."

That ended at page 19, line 16. At page 20, beginning at line 13—no, excuse me, Your Honor. I don't need to read that. Page 21, beginning at line 3:

"QUESTION: Would you please look at what has been marked as Plaintiff's Exhibit Number 3, Mr. Polovoy?

ANSWER: Yes.

QUESTION: Is Plaintiff's Exhibit Number 3 a complete copy of the Regulations adopted under the Maryland Securities Act, to date?

ANSWER: Correct."

Your Honor, I think we neglected to ask the [51] Court in the earlier hearing to take judicial notice of the Maryland Regulations. We have a copy here that Mr. Polovoy has just identified in his deposition which we'll mark as Plaintiff's Exhibit 7, if that's all right.

(Plaintiff's Exhibit Number 7
was marked for identification.)

MR. CONANT: Continuing on page 21, oh, that quotation took us to line 9,—

THE COURT: Page 21?

MR. CONANT: Page 21, line 9, yes, sir. Now, we're skipping to page 21, line 15.

"QUESTION: Mr. Polovoy, in your opinion, does the Maryland Corporate Take-Over Law purport to apply extra-territorily so as to prohibit a tender offer from going forward in any state until and unless requirements of the Maryland Act have been complied with?

ANSWER: I think the answer would be yes, provided that the Commissioner first makes a determination that the target company, as that definition is used in the Act, is in Maryland and that Maryland does have jurisdiction."

That took us to page 22, line 2. At page 23, this will go from lines 8 through line 14:

[52] "QUESTION: Mr. Polovoy, to your knowledge, have there been any judicial interpretations of the Maryland Corporate Take-Over Law?

ANSWER: There have not been any.

QUESTION: Is there any pending litigation in the State of Maryland interpreting the Act?

ANSWER: Not in the State of Maryland, no."

Last, Your Honor, page 32, lines 3 through 16:

"QUESTION: Would you agree that it would be very difficult for a company considering making a tender offer in reading your statute in connection with that consideration to decide whether or not, decide what substantial portion of assets in the state would mean?

ANSWER: It would certainly not be entirely free from doubt, but I think a company with knowledgable counsel and with knowledge of all of the relevant factors I think could help the company make that type of determination.

QUESTION: But they could never be safe, would they, Mr. Polovoy, without coming to the Commissioner of Securities?

ANSWER: Never completely safe, that is correct; never completely safe."

That's all we have from that deposition, Your [53] Honor, and we offer what was identified in Mr. Polovoy's deposition as Exhibit 3 to that deposition. We have now marked that as Plaintiff's Exhibit 7, being the Rules and Regulations of Maryland.

THE COURT: Any objection to the Regulations?

MS. GOODMAN: I would request, Your Honor, that the complete deposition of Mr. Polovoy be introduced into evidence. Was that your intention?

THE COURT: No. He doesn't, but I will consider it all offered.

MS. GOODMAN: I would appreciate it.

MR. CONANT: I have no objection.

THE COURT: He has no objection so I'll consider the entire deposition.

MS. GOODMAN: Thank you, Your Honor, and I'd like to just follow through for the record on page 13 where it says, "Is it a true statement, Mr. Polovoy, that you have stated an intention to call a hearing to determine jurisdiction in the State—of the Maryland Statute?

No, that is not. I have indicated to both parties that I would be willing to have a hearing if any party requested it on the jurisdictional issue, whether or not Maryland has jurisdiction, [54] but on my own volition I have not at any time indicated that I intended calling a hearing." And I refer now to page 14.

THE COURT: Where did you end there?

MS. GOODMAN: I beg your pardon?

THE COURT: Where did you end?

MS. GOODMAN: I'm sorry. Page 13.

THE COURT: Okay.

MS. GOODMAN: Page 4—It was line 14 through 21.

THE COURT: Thank you.

MS. GOODMAN: And I would like to call and put into the record the statement that was not read by Counsel, and that is on page 14, line 2.

"QUESTION: Has anyone requested that you call a hearing on that issue?

ANSWER:"

On line 4. "No, no one has requested it."

THE COURT: Now, you also want me to consider the rest of the deposition as well?

MS. GOODMAN: Yes, if it pleases the Court.

THE COURT: Okay. I'll consider the rest as well. 7 will be admitted, the Regulations.

MR. CONANT: Thank you, Your Honor.

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of James R. Parish, witness on behalf of Plaintiff—Direct examination, Cross examination at p. 74, Redirect examination at p. 86

[63] * * *

JAMES R. PARISH

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. State your name, please, sir.

A. James R. Parish.

Q. Mr. Parish, how are you employed?

A. I am employed by Great Western United Corporation.

Q. And in what capacity?

A. As Vice-President and Treasurer.

Q. How long have you been so employed?

A. Since May of 1975.

Q. What did you do prior to that time?

[64] A. I was a consultant for Great Western United for three months from February through May of 1975.

Prior to that I was employed with another firm in Denver, Colorado.

Q. Mr. Parish, in your capacity as an officer of Great Western United Corporation are you familiar with, generally familiar with its corporate affairs including its place of incorporation, the places where its stock is traded, where its principal offices and officers are located and the like?

A. I am.

Q. In what state is Great Western United Corporation incorporated?

A. Delaware.

Q. Is the stock of Great Western Corporation publicly held?

A. It is.

Q. And is it listed and traded on any exchange?

A. The common stock is traded on the New York Stock Exchange and the Pacific Stock Exchange. We have an additional issue of stock traded on the New York Stock Exchange.

Q. Where are the corporate headquarters of Great Western United?

A. I have to make a distinction here. There are [65] corporate offices in Denver, Colorado, but the executive offices and the location of the executive management of the company is in Dallas, Texas.

Q. Are the principal corporate officers resident in Dallas, Texas?

A. They are.

Q. Where are the principal books and records of Great Western United kept?

A. In Dallas, Texas.

Q. Is the majority, are the majority of the shares of Great Western Corporation owned by residents of Dallas, Texas?

A. They are.

Q. Are all of the Board members of Great Western United Corporation residents of Dallas?

A. They are certainly residents of Texas. I do not know if all of them are residents of Dallas.

Q. Mr. Parish, are you familiar generally with the proposed tender offer by Great Western for shares of the stock of Sunshine Mining Company?

A. Generally, yes.

Q. Are you aware that a press release was made by which that was initially announced publicly?

A. I am.

Q. Mr. Parish, let me show you what we have [66] marked as Plaintiff's Exhibit No. 9 and ask whether that is the press release to which we just referred?

A. Yes, sir, it is.

Q. This press release is dated March 21, 1977. To the best of your knowledge was that the date on which it was issued?

A. That's correct.

A. And additionally, to the best of your knowledge was this the first public announcement of the proposed tender offer?

A. Yes, sir.

• • •

[72] • • •

Q (By Mr. Conant) In response to your press release, Great Western press release, Mr. Parish, did the shareholders of Sunshine Mining Company have an opportunity to tender their shares to you?

A No, sir.

[73] Q When do you understand would be the first time when the shareholders of Sunshine will actually really have that opportunity?

A It's my understanding that until a notice of offered purchase is published or a booklet describing the offer to purchase is mailed to shareholders that they cannot tender and we cannot accept tenders of shares.

Q Has either of those two things occurred? By that I mean the publication of the notice or the sending of the offer to the shareholders?

A No, sir, that has not occurred.

Q In connection with the proposed Great Western tender offer have you secured or has Great Western secured a shareholder list of Sunshine Mines?

A We have.

Q Have you investigated that shareholder list to determine whether there are any shareholders who appear to reside in the State of Texas?

A I have, and there are at least 489 who are noted on the list as residing in Texas. There may be additional residents of Texas who own those shares but we have no way to tell from the list.

MR. CONANT: Your Honor, we have that whole shareholder list if there's any real objection to [74] it. It's about this high (indicating) and so if there are no substantial objections to that we will not offer it.

MS. JUVILER: Mr. Conant, could you ask one question of the witness to clear it up for us, and ask did he

look at—did he look at that list; will you just ask that one question to clarify that somebody did examine that box?

Q (By Mr. Conant) Did you examine that shareholder list personally?

A I did.

MR. CONANT: At my direction.

MS. JUVILER: And he doesn't wear glasses.

MR. CONANT: Pass the witness.

THE COURT: Thank you. Cross examine.

CROSS EXAMINATION

BY MR. HEISER:

Q Mr. Parish, I'd like to ask you if, in your examination of the shareholder list, you noticed whether or not there have—there were any shareholders listed as being in the State of Idaho?

A I'm certain that Idaho shareholders appear.

Q And you did see some on the list?

A I saw one or two.

• • •

[86] • • •

REDIRECT EXAMINATION

BY MR. CONANT:

Q. Mr. Parish, I think I neglected to ask where Great Western considers its principal place of business [87] to be?

A. In Dallas.

• • •

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of John S. Guest, witness on behalf of Plaintiff—Direct examination

[106] • • •

JOHN S. GUEST,

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. State your name, please, sir.

[107] A. John S. Guest.

Q. And Mr. Guest, by whom are you employed?

A. I am employed by the firm of Kuhn, Loeb & Co., (spelling) K-U-H-N L-O-E-B, & Co., Incorporated, New York City.

Q. And in what capacity are you employed by Kuhn Loeb?

A. I am a managing Director and Treasurer of Kuhn, Loeb & Company.

Q. How long have you occupied that position?

A. Since February the 1st, 1977.

Q. And what did you do prior to that?

A. Prior to that I was a partner of the firm of Kuhn Loeb & Co., not incorporated.

Q. Do I understand, then, the change was really, not really your status, but in the nature of a type of entity that Kuhn Loeb was?

A. Yes.

Q. For how long were you a partner of Kuhn Loeb?

A. I was a partner for approximately fifteen years.

Q. And before that what were you?

A. I was an employee or associate as we call it from 1937 onwards with a break for war service.

Q. What is your educational background?

[108] A. I was educated in England at Cambridge University, and then attended the Harvard Business School.

Q. Are you a member of the New York Stock Exchange?

A. Yes, I am.

Q. And are you a licensed member of the New York Society of Security Analysts?

A. Yes.

Q. Tell us, if you would, what the nature of Kuhn Loeb's business is.

A. We are an investment banking firm, and the functions of our firm are arranging for capital issues by corporations, municipalities, and other entities in the United States and international markets, and the distribution of those securities to investors throughout the world. We also advise investers on the purchase and sale of securities for their own account.

Q. Do you also engage in the business of being a dealer manager in tender offers?

A. Yes, we do.

Q. And do you assist clients in arranging various sort of corporate financial transactions that may or may not involve capital issuance?

A. Yes. We provide general financial advice as well as advice related to actual transactions.

[109] Q. And has Kuhn Loeb since 1937 been involved in one way or other, been involved in tender offers?

A. Yes, we have.

Q. Are you familiar with what is called the Williams Act at least as it affects Kuhn Loeb's business and advice and relative to the market and like matters?

A. Yes, I am generally familiar with the Act as it affects our business.

Q. Likewise, have you in the course of your employment as a partner of Kuhn Loeb become generally familiar with what are called generically the State Takeover Acts as they affect the market and tender offers?

A. I am aware that there are Takeover Acts in certain states, and I am aware of their applicability to transactions.

Q. Have you become aware of the manner in which they affect a proposed tender offer?

A. Yes, sir.

Q. Have you observed—well, excuse me, strike that.

Am I correct in saying, to the best of your knowledge, that most of these State Takeover Statutes are recent in origin, that is within just the past eight years or so?

[110] A. That is the case as far as my experience is concerned.

Q. Have you, as an experienced observe of the market and the financial community, observed the effect or the impact of the State Takeover Acts on takeovers?

A. Yes, I have.

• • •

[114] • • •

Q (By Mr. Conant) All right. Mr. Guest, I believe just before the break you said that you had observed an

effect of the State Take-Over Acts on the course of tender offers generally. What is that effect or those effects?

A The principal effect as it affects security holders and the two companies involved, the offor and the target is to inject an element of delay. The first element of delay is to determine whether the management of the target company is in fact going to endorse the offer. If it does that perhaps maybe the limits of the delay and the offer then proceeds. If the management does not endorse the offer, the management has recourse to certain state authorities and state courts, and the company—the offor company and also the target company may well be uncertain as to whether in fact the particular transaction is subject to the jurisdiction of whatever Courts the target company has sought relief in. The effect of all of this is a compounding delay effect which becomes increased by the uncertainties because sometimes if you don't know whether the offer is subject to a state law a long time may elapse before you find out.

[115] Q Let's back up one step and ask what really is the purpose of a tender offer?

A The purpose I could analyze from a point of view of three parties, perhaps four. The first part is the offor who sees a corporate opportunity to employ either securities or in what we're talking about today, cash, to put it to good use for the benefit of his own stockholders. That is his purpose. From the purpose of the target company, it is a purpose of improving their operations, if, in fact, the offor is able to do so. From the point of view of the stockholders of the target company, it offers them an opportunity to dispose of their holdings at a price which will

normally be in excess of the previous prevailing price or perhaps even a price that they might expect to continue absent an offer. The fourth group is from the point of view of the management of a target company that produces in the offer, produces great uncertainties in their mind because of a change of control of the management of the target company if the offer is unsuccessful.

Q All right, sir. Let's—I think we both realize that there's a vast difference between tender offers that are made where the offor is offering securities and where it's offering cash, so for the [116] duration of our discussions, if we can, let's restrict it to just cash tender offer. All right, sir?

A Sure.

[117] Q. (By Mr. Conant) Well, in light of these purposes that you have given for a tender offer, from the offeror's standpoint and the other standpoints, what, then, in what way is that purpose or those purposes affected by the delay that is injected by the State Takeover Acts?

A. It means from the point of view of the offeror company that the funds he had committed or arranged for the proposed investment in the securities of the target company are in a sense locked up unless he chooses to abandon the project, and he is also unavailable to use those funds, or that credit for other corporate opportunities that may emerge during this delay period. So he is somewhat frozen and the ability of that company to manage its affairs is hurt.

Q. What is the effect then of—

THE COURT: Well, if he has borrowed those funds he has to pay the prevailing interest rate in the interim, is that correct?

THE WITNESS: Well, he may, sir. That varies as to whether he has to pay charge for the use of the funds, or whether he has other arrangements.

THE COURT: Do you know where you can get them without any charge?

THE WITNESS: There is no such thing as a [118] free lunch, Your Honor.

THE COURT: All right. Go Ahead.

Q. (By Mr. Conant) Actually, if an offeror is using its own cash that it has on hand, there is always a cost of capital, is there not?

A. That's what I think I meant.

Q. We may yet come back to the effects on the offeror, but what then are the effects of delay to the incumbent management of the target company?

A. The incumbent management of the target company can use this delay in several ways to obstruct the offeror to prevent it being revived. They can do it through litigation. They can do it through propoganda, and also they can do it by soliciting some other deal with another corporation or entity which might be more sympathetic to the incumbent management of the target company.

Q. Are there various, more or less, standard defensive tactics that can be employed by the incumbent management of a target company if they have time to do it?

A. Yes, there are.

Q. Can stock dividends be used as a defense mechanism?

A. That is one.

[119] Q. And have you known of inflated dividends, that is where the company declares a much larger dividend

during the interim period in order to discourage the shareholders from selling?

A. Yes, there are cases where that has happened.

Q. Is it generally regarded in the investment community that the delay in the effectuation of a tender offer really only inures to the benefit of the target company, the incumbent management of the target company?

A. I am not certain that I would say only to their benefit. Principally to their benefit. It is always possible that some third party during that delay period may emerge with an offer which in fact is more in the interest of the stockholders.

Q. When a cash tender offer is first announced what is generally the effect on the market for that stock?

A. The initial effect will be for the—may I start again?

Assuming that the tender price mentioned in the notice of intention which is filed with the SEC, if the price is higher than the prevailing market price, and this is the normal case in tender offers, after the market receives this news the quotations for the stock of the target company will be higher than they were be- [120] fore the tender offer was announced.

• • •

Q. (By Mr. Conant) Mr. Guest, at my request did you have done under your direction and control a chart made up on the stock prices of Sunshine Mining Company for the period immediately prior to the announcement of the Great Western proposed tender offer through the present?

A. Yes, I did.

Q. You have that with you?

A. Yes.

• • •

[121] * * *

Q. (By Mr. Conant) Mr. Guest, let me show you what we have now marked as Plaintiff's Exhibit 11 and ask whether that is the chart that was prepared by Kuhn Leob at your direction on the Sunshine Mining Company stock prices?

A. Yes.

MR. CONANT: Your Honor, we will want to introduce Plaintiff's Exhibit 11 and then testify further about it.

THE COURT: These are price fluctuations?

MR. CONANT: Yes, Your Honor, these are the prices, the daily high, low and closing prices from March the 15th through April the 6th of Sunshine Mining Company.

THE COURT: What exchange are we talking about?

THE WITNESS: These are the quotations in the Wall Street Journal. The New York Stock Exchange is the principal exchange, but it is a consolidated tape now, so it represents transactions on all exchanges.

THE COURT: Thank you. Is there any, other than your other objection, is there any additional objection?

[122] MR. HEISER: Your Honor, I would like to ask what the relevance of this is from counsel.

MR. CONANT: Your Honor, we think it is relevant to show the reaction of the market to this stock price, the effect of the delay not going forward with this offer, the deleterious effect on the shareholders themselves, and the effect that these state tender offers have on what is clearly a national market.

THE COURT: Okay. I'll admit it.

MS. JUVILER: Your, Honor—

MR. HEISER: The relevance objection is—

THE COURT: Yes, you have those continously.

MS. JUVILER: Well, Your Honor, this is a new piece of evidentiary material other than the witness himself, and we see no relevance on Mr. Conant's statement other than to the merits of the action. We think it is totally inappropriate in a hearing on jurisdiction and venue.

THE COURT: Overruled.

MS. JUVILER: And Mr. Conant had represented to us earlier that this was going to be very short testimony. May I inquire how much longer the testimony is going to continue on the merits?

THE COURT: I don't know. He is probably [123] getting close to the end.

MR. CONANT: I would imagine, yes, Your Honor.

[124] Q Mr. Guest, are you aware that the Hunt tender offer or the Great Western proposed tender offer was announced on March 21 of this year?

A Yes, I am.

Q Prior to that time in what general range was the Sunshine Mining Company stock traded?

A From the beginning of 1977 through March 17 the range was a low of eleven dollars per share and a high of fourteen and a half. That's $14.50 per share.

Q All right, sir. I notice on this particular chart the $11.00 figure does not—does not show. Is that something that you determined for yourself?

A This was an item I picked out of the paper myself this morning and entered on this document.

Q All right.

A The paper typically shows the high and low every year for every stock printed.

Q On the first trading day following the announcement of the proposed tender offer what was the stock price?

A On March 22 the stock price fluctuated between $15.75 and $16.00 a share.

MR. HEISER: Your Honor, we object. That is in evidence and it speaks for itself.

THE COURT: It does speak for itself. He [125] is just interpreting it, pointing out a few things on there he wants to emphasize and I'll let you do the same.

MR. CONANT: I'm not going to walk through all the figures.

THE COURT: Oh, please don't.

Q (By Mr. Conant) I notice on the second trading day that the stock traded at a high figure of sixteen and an eighth.

THE COURT: What date are you talking about?

MR. CONANT: That would be March 23, 1977.

Q (By Mr. Conant) Was that in fact a high for the year of Sunshine Mining Company?

A Yes.

Q The—are you aware that the announcement—

THE COURT: Let me ask, do you know how much the amount of the tender offer was?

THE WITNESS: Yes, sir.

THE COURT: How much?

THE WITNESS: It was announced that the tender offer price would be $15.75 if the management was not going along with the offer, but that there might be an offer of $16.75 with a concurrence of the management. I believe that's what I read in the announcement.

[126] THE COURT: Thank you.

Q (By Mr. Conant) Are you aware that it was on April 1st this year that it was publicly announced to the investment community that Great Western's tender offer had been enjoined by a Court in Idaho?

A I'm not entirely certain as to the date but I know it was approximately then.

Q Thank you. In any event, I believe April the 1st was on a Friday and in the succeeding week what has been the range of the stock prices?

A During the week commencing April the 4th the high level was $15.25 and the low point was $14.37 and a half cents.

Q Mr. Guest, in light of the fact that the proposed tender offer price was $15.75 how do we account for the fact that for—on at least some trading days the stock was actually trading at a price higher than that?

A This is a normal condition in tender offers and reflects the activities of a group of dealers acting for their own account who are known as arbitragers.

Q Tell us, if you would, briefly how the arbitrage system works in the context of a tender offer.

A A dealer, who is a member of the National [127] Association of Securities Dealers, in permitted in all of these tender offers to receive a fee from the offor or company in respects of shares tendered by that dealer.

Now, the payment of this fee can go to one of two groups of people. It can go to the local broker who in fact has contacted his client, the stockholder, and said I will take care of all the paperwork for you and I will send everything in to the company and you will still get the offer price and the dealer will receive a fee from the company

for his service. It does not come out of the stockholders' pocket. That is one group of people who are entitled to the sixty cents.

Now, the effect of the arbitrager is entirely different. The reason is, when the stockholder, either directly or through his broker, has tendered his stock after the offer has commenced, he has no way of knowing at the end of the offer period whether in fact he will get all of his shares accepted or whether there may be such a demand for shares that it will be as we call it prorated, and in fact out of a hundred shares he may only get eighty shares accepted and he'll have twenty returned to him. Therefore, a stockholder has a second option. He can sell on a National Securities Exchange. [128] By doing so a stockholder immunizes himself from the risk that he won't get all these shares accepted. Now, how does he sell? He sells through his broker to a dealer on the other side in the New York Stock Exchange who is operating as a principal not as an agent like the broker was I mentioned earlier, and this principal will buy over the Stock Exchange in a price such as such quoted in the Wall Street Journal at the regular printed price. He may pay a price which in fact is higher than the tender offer price, and he can afford to do that because as long as the difference between the price he pays and the tender price is less than the amount of his fee I mentioned, which is payable when he turns the stock in, he'll make a profit. Now, what he does to earn that profit is taking great risks because he's first taking the risk that he's bought all the shares and when he tenders them to the company, the company may say we're only

accepting seventy five percent, and it has to be prorated among everybody, so that he'll be cut back and given back a quarter of his shares, so he's taking the chance that he may be stuck with some shares the company doesn't accept. He's also taking the risk—

THE COURT: He'll make a profit on the ones he does tender and that are accepted?

[129] THE WITNESS: He'll make a profit if the offer is concluded. But I was going to say, Your Honor, he also takes the risk that after he's bought the shares the offer may be torpedoed, enjoined by some legal court, and in fact the company will not be able to accept the shares. Now, the arbitrager will not be able to go back to the person he bought them from and say, well, the deal is off. Here's your stock back. He has bought the shares firm and this is the function of the arbitrager. It is an element of risk taking and this is one of the things particularly in cash tenders which is an opportunity that shareholders of the target company have to accept a price which will be, reflects a good part of the premium which the tender offor is making or offering and taking no risk that the deal may be called off. This is what the effect of the arbitrage function is.

Q (By Mr. Conant) So if that tender offer is delayed the arbitragers risk money, he has the same cost of capital loss that you were talking about earlier with regard to the offor, is that correct?

A Yes, indeed, and most of the firms in the street do not have as much money as offor companies. [130] Their cost of capital is much more significant. They have to turn over their capital more rapidly and any delay will make

them much less willing to buy stock on the market, and in fact they would then lower their bid. If somebody offered them some shares they'd say, well, I can't pay what you're offering, I'll bid you less, and therefore the price on the market would be—would decline because of the effect of less demand for the supply of stock available.

Q All right. And so then I probably understand that the longer the matter is delayed the less the arbitragers are willing to pay for the stock or they're getting out altogether?

A The less they will pay, and also a number of arbitragers may try and unload before the thing is finally called off, if that's what they think is the outcome.

Q Okay. Is a result of that unloading generally expected to be a reduction, a further reduction in stock price?

A Yes.

Q Mr. Guest, does delay at, sometimes affect, otherwise affect a title offer, I mean a tender offer? Can it in fact lead to an ultimate frustration of the entire offer?

[131] MR. HEISER: Object to the question, Your Honor.

THE COURT: Let him finish the question first. Go ahead.

Q (By Mr. Conant) Can delay play any part in the complete frustration of a tender offer?

A In my experience the longer one of these things is delayed the more expensive it becomes for the offor or company to pursue the effort and—because I mentioned that it means during this whole period he has to perhaps forego other investment opportunities. He may finally come to the conclusion I'd rather drop all of this and go after

something else. That, of course, has a deleterious effect on the stock of the target company.

[132] Q. (By Mr. Conant) If a tender offer is entirely frustrated does the offeror nevertheless have certain additional expenses to pay, that is over and above what he has paid up until the time it's finally abandoned?

A. Yes. There are expenses which have been incurred by the dealer manager which normally are reimbursed.

MR. HEISER: Your Honor, it's beyond the scope of the question. The question asked for a yes or no answer.

THE COURT: I think it does. Your answer is yes or no?

A. Yes.

Q. (By Mr. Conant) What is the nature of those additional expenses that must be paid even in the event of frustration?

A. Those are expenses which are payable to the dealer manager and the dealer manager's counsel, and reimbursement of out of pocket expenses of dealers and others for postage and other solicitation expense. Those are typically paid even if a deal is called off, because they should not come out of the broker's or the dealer's hides.

Q. Is it fair to say then, Mr. Guest, that in the event of a cash tender offer, delaying the course [133] of that tender offer inures only to the advantage of incumbent management?

THE COURT: Well, he has indicated that the stockholders may sustain some advantage by someone else coming in and making a higher offer.

MR. CONANT: Yes, Your Honor.

THE WITNESS: I believe I did answer that one.

THE COURT: So the shareholders would probably have some advantage to a delay. All right. Now, is there any other advantage that would be shared by anybody else?

THE WITNESS: The only other advantage I can see is if some piece of corporate good news, like striking oil, occurred during the delay period, which would mean that the normal price of the stock, the pre tender price was in effect unrealistic, and if they had accepted the pre tender price they would have missed out on this bonanza that occurred in the interim. That could be a conceivable benefit.

Q. (By Mr. Conant) Assuming there is no corporate good news, the longer the tender offer goes on generally the lower the prices are going to go of the stock?

A. Yes, and I would also add that the stockholder [134] is bearing the risk of bad news, too. He might end up worse than he was quite apart from the impact of the arbitragers selling their stock, the market for the stock, anyway, might be lower.

• • •

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of Leon Lebowitz, witness on behalf of Plaintiff—Direct examination

[139] • • •

LEON LEBOWITZ,

called as a witness by the Plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. Would you state your name, please, sir?

A. Leon Lebowitz.

[140] Q. And what do you do for a living, Mr. Leboitz?

A. I am a Professor of Law at the University of Texas at Austin.

Q. What do you teach at the University of Texas?

A. I teach a course in business associations which is essentially partnership and corporation law. I also teach a course in securities regulation. I also teach a course in introductory procedure.

Q. How long have you been at the University of Texas?

A. Twenty-one years.

Q. And where were you before that?

A. I was on the faculty at Baylor University.

Q. What courses did you teach at Baylor?

A. Essentially the same courses.

Q. Mr. Lebowitz, are you in any organizations or connected with any committees which study legislation and make recommendations concerning whether such legislation should be adopted in the State of Texas or anything of that sort?

A. I am. I am a member of the State Bar of Texas. I am also a member of the Section of Corporation and Banking and Business Law. In fact, I am the immediate past chairman of that section.

I am also a member of the Committee on Corporate [141] Revision Laws, and a member of the Committee on Securities and Investment Banking. Both of those two

committees make recommendations for legislation to the Texas Legislature with respect to corporate law and securities law, and as a matter of fact, virtually all of the corporate and securities regulation and legislation that has been passed in the last twenty years or twenty-five years has emanated from these committees.

In addition, these committees prepare comments which appear in the Annotated Statutes of the state.

Q. Has the committee had occasion to study the advisability of a State Takeover Act for the State of Texas?

• • •

[142] A. The committee has had at two—the Committee on Securities and Investment Banking on two separate occasions has considered the advisability of what you term takeover legislation or tender offer legislation.

The first time the matter was considered was at the fall meeting in September 18th, 1976.

By the way, I have the minutes of these two meetings.

At which time the agenda for the year in effect, the work of the committee was to be considered as to what projects we wanted to pursue in light of the fact that the legislative session would take place in January.

And at that time someone raised the issue should we consider tender offer legislation, and the matter was rather summarily dismissed on the ground that tender offer legislation was not needed in Texas, and there was not much discussion of the point.

At a second meeting which was held on January the 29th of this year, at a meeting held in Dallas, it was brought to the attention of the committee that there was going to be

introduced, or had been introduced in the legislature a tender offer statute, and we traditionally will take a position with respect to legislation that does not originate with our committee to decide if our committee wants to take a stand pro or against, [143] pro or con with regard to the legislation and make our views then known to the appropriate legislative committees.

At that time we had, according to the minutes, a very protracted discussion of the matter, and it was the unanimous opinion of the committee that Texas did not need a takeover legislation. But that if takeover legislation had to be adopted because of political realities dictated such, that we preferred a statute not along the lines of the model takeover statute which I think had been proposed by the Council of State Governments which was along the lines of, as I have since discovered, the legislation which is involved in the three states here, but rather in terms of the Delaware Statute, because we thought that it tended to be more neutral than the other types of state statutes.

Q. By neutral, what do you mean?

A. Well, in the sense that it was not weighed too greatly in favor of either the tender offeror or the target company. I think, as I recollect the discussion when we had our meeting, and I can't recall precisely who said what and perhaps had I know that I might be called upon to testify later as to what was being said, that I might have paid attention to who said what. But my recollection of the deliberations of the meeting was [144] that there were a variety of reasons expressed why tender offer legislation was not desirable in the first place.

There were some who felt that, perhaps free market economists, that any tender offer legislation inhibited the right of a shareholder to sell his stock at a premium whenever a tender offer was made.

There are others who felt that, well, Texas companies were not particularly targets of tender offers, and perhaps in some instances they might like to make some tender offers, therefore we don't need inhibiting legislation.

And I think also a feeling, particularly by the securities lawyers who had had considerable practice in the field, that they felt that the Williams Act was probably sufficient in informing the investors of the amount—to provide the investor with the kind of information he needed with respect to the tender offer, and that it appeared to be a fair statute in the sense of not taking sides one way or the other.

Assuming that—well, again considering the state statutes that were then available, and, of course, by this time I guess in '77 we were all aware of the fact that there were now over twenty states that had tender offer legislation, and again some folks on the [145] committee had experience with them and felt that the pattern of state legislation had become so chaotic because of the differences between one state's statutes and another, that it was virtually impossible for a tender offeror to be able to comply with all of them, and because this legislation had become so complicated we did not want Texas, in effect, adding to the system of chaos. We preferred to stay with the state system.

Plus the reaction, as I have indicated before that the state statutes that had been passed were by and large

weighted on the side of management in the sense that you had delays that it could entail. You had prefilings that had to occur. You had administrative hearings that might have to take place and that could further delay the proceeding, and that's why we felt that if we had to have a tender offer statute we preferred the Delaware approach, which does call for a twenty day prefiling period, then I think a twenty day period of time for the offer to stay open, but does not provide for any administrative hearings that might further delay the offer.

[146] • • •

Q (By Mr. Conant) You say that's the consensus in the vast majority of use of your Committee and it will so express itself to the Texas Legislature should it be called upon to do so in connection with pending legislation?

A That's correct.

Q You mention the chaotic administrative problems of the State, various state take-over acts. Let me show you what I've marked as Plaintiff's Exhibit 12 and ask whether you can identify that for me, please, sir?

A Yes. This was a table that was prepared by a student in a seminar that I had this past fall who wrote a paper on state tender offer legislation, and [147] as part of her study she prepared this chart which took the features of all of the current state tender offer statutes and compared them in terms of what target companies were covered; for example, whether there were any exemptions for the statutes, in terms of whether there was a waiting period, in terms of whether an administrative hearing was required, in terms of what kind of information was to be furnished and so forth.

Q Was this document then prepared under your direction and control?

A Yes. As a seminar student she worked directly under me and I supervised her work.

MR. CONANT: Your Honor, we will offer Plaintiff's Exhibit 12.

MR. HEISER: Your Honor, we will object to the admission of Plaintiff's Exhibit 12 on the grounds that it relates to laws which speak for themselves of which this Court may take judicial notice on the grounds that the document itself in the way it's prepared is hearsay and on the grounds that the document purports to reach a legal conclusion which is impermissible under the Federal Rules of Evidence and I cite to the Court the case of *Marks & Company, Incorporated, Plaintiffs* versus the *Diners Club, Incorporated and Others,* [148] *Defendants.* It's a Second Circuit United States Court of Appeals case cited September—pardon me, February 25, 1977. It's reported in CCH Federal Securities Law Reporter, paragraph 95,892.

THE COURT: What does that case hold?

MR. HEISER: That case holds that it is not proper to allow expert testimony to a legal conclusion. We submit that this document speaks to a legal conclusion.

THE COURT: Well, I agree with you. I think all the statutes will speak for themselves and it will be ultimately up to the Court if the Court is required to do so to interpret each statute. As I understand it, this is just an examination.

MR. CONANT: I think really, Your Honor, the document doesn't purport to take away from the fact that the statutes speak for themselves but merely to compare the different terms in those statutes in chart form.

THE COURT: I'm going to admit it for that limited purpose only and--so far as the statutes are concerned—I'm not going to be bound by what the chart itself indicates. If there's any question about it I'll look directly at the law itself and make my own determination of that.

Transcript of April 8, 1977, jurisdiction and venue hearing:

Testimony of William S. Dugan, witness on behalf of Defendant Lefkowitz, Attorney General of New York—

Direct examination

Cross examination at p. 176

Redirect examination at p. 186

[153] DIRECT EXAMINATION

BY MS. JUVILER:

Q Will you please state your name?

A William S. Dugan.

Q What is your present position, Mr. Dugan?

A I'm a Deputy Assistant Attorney General in the Department of Law in the State of New York.

Q Do you have a specialty in that department?

A I was hired under a grant, under a program set up to administer the New York State Tender Security Take-Over Disclosure Act.

Q When were you first employed?

A That was in approximately October of last year.

Q October, 1976?

A Yes.

Q Are you familiar with the Great Western United Proposed Tender Offer?

A Yes, I am.

Q How are you familiar with that?

A I was assigned that Tender Offer to review by Mr. Martin Weber.

Q And who is Martin Weber?

A He is also an Assistant Attorney General in—in the New York State Attorney General's office.

[154] Q Can you state very shortly what the relationship of the New York State Attorney General to the New York—New York Take-over Statute is?

A Of the Attorney General? The Attorney General is empowered under the New York State Security Take-over Disclosure Act to investigate any take-over bids involving corporations which are incorporated under the laws of New York or having their principal place of business and substantial assets within that state.

Q And in this regard is he the lawyer for a state agency? Is the Attorney General the lawyer for the state agency which administers this Act?

A Yes, he is.

Q Is he the administrator of the Act as well?

A Yes, he is.

Q For clarification, am I a member of the Securities Bureau of which you are a member?

A No, you are not a member of the Securities Bureau.

Q To your knowledge do I as the counsel here have anything to do with the administration of securities in the Attorney General's office?

A No.

Q Can you tell me when you first became acquainted with the Great Western United Corporation?

[155] A On Tuesday, March 22 I was assigned the review of the take-over bid by Martin Weber and I was handed a memorandum prepared by the law firm of Skadden, Arps to read and review.

THE COURT: Would you give us those names slowly?

THE WITNESS: Skadden, Arps.

Q (By Ms. Juviler) Is that Skadden, Arps, Meagher, I'm—I've forgotten one in between; of which Mr. Strom is a member or associate?

A Yes, he is.

Q Did you—you were required to review the memorandum that was referred to by Mr. Strom, is that correct?

A Yes, I was.

Q And that was on March 22?

A Yes.

Q Did you have any contact with any representative from Great Western thereafter?

A Yes, I did.

Q Can you tell us in outline form what those contacts were?

THE COURT: Who was it first, if you know?

MS. JUVILER: Yes.

Q (By Ms. Juviler) Who they were, when they [156] occurred and what was said?

MS. JUVILER: And they're not being introduced for the truth of what was said.

THE COURT: They're not?

MS. JUVILER: They're not being introduced for the truth of what was said but just that they were said, that these statements were made.

THE COURT: Okay.

MS. JUVILER: Not that—not that it is true that Great Western is offering, not that it is true that—okay.

THE COURT: All right.

A On, I believe March 22, in the afternoon I called Mr. Robert Pirie who I believe is a member of the firm

of Skadden, Arps. I inquired of him whether or not the proposed tender offer for shares of Sunshine Mining Company was to be effected within the next day or two. He informed me that it was not.

THE COURT: It was not?

THE WITNESS: It was not.

[157] Q. (By Ms. Juviler) Did he ask you anything, or was that the end of the conversation?

A. I believe that was the end of the conversation. No, excuse me. He made an inquiry as to whether or not a meeting could be held with representatives of our office to discuss the proposed takeover bid.

Q. What did you respond to him?

A. That I would see what I—what could—what could be arranged.

Q. Thereafter did you have any other contact with Great Western United?

A. Yes. The following day we had, March 23rd, I had another telephone conversation with the same Mr. Pirie, in which I—

Q. Excuse me, who called who in this one, if you remember?

A. The telephone conversation I am referring to right now, I believe I called Mr. Pirie.

THE COURT: Was this in regard to the meeting he had requested?

THE WITNESS: Yes.

THE COURT: Anything else?

THE WITNESS: I told him at that time that we were still looking into the jurisdictional question, and that—and that although we had not found on [158] the jurisdictional question we were leaning towards a finding of jurisdiction.

THE COURT: Okay. Go ahead.

Q. (By Ms. Juviler) Did Mr. Pirie ask you for any further information?

A. At that time I believe not.

Q. Did he make any further comments?

A. No. None that—

Q. When was your next contact with a representative for Great Western United, if any?

A. The following morning, this would be Thursday, March 24th. Mr. Pirie called me at around 9:15, I believe, in the morning.

THE COURT: March 24th?

THE WITNESS: Yes, that Thursday.

A. He stated that he could not, from the best of my recollection, he stated that he could not understand why New York was even thinking of asserting jurisdiction over the proposed tender offer for the shares of Sunshine Mining Company.

Q. (By Ms. Juviler) Did you respond to that statement?

A. I believe we had a discussion about—about certain—certain things that were incorporated in the memorandum of law which had been filed with the office [159] on that Monday.

THE COURT: By his law firm?

THE WITNESS: Yes, by his law firm.

THE COURT: All right.

Q. (By Ms. Juviler) Relating to jurisdiction or relating to some other matter, Mr. Dugan?

A. Relating to jurisdiction. I believe in that conversation I asked him what executive officers were there in

Kellog, Idaho. The memorandum of law had stated that there were several executive officers who were based in New York, and I inquired as to whether or not there were any based in Idaho.

Q. Did he respond to that?

A. I believe yes, he said—he said there were. I have forgotten the exact details.

Q. Did he say anything besides the comment that he didn't know why New York, whatever that comment was, I don't want to characterize your testimony?

A. He stated that I should—well, he suggested that I look into the bank accounts of the target company, Sunshine Mining, to see whether or not funds had been channeled in from other states into New York during the past week, the week preceding the time period we are talking about.

Q. Did he ask you anything else?

[160] A. Not that I—no, excuse me. He stated that Maryland, the Maryland Securities Commissioner had agreed to hold an evidentiary hearing bearing upon jurisdiction, whether or not jurisdiction over the tender offer lay in Maryland, and that if such a hearing were held that a decision on whether or not jurisdiction lay in Maryland would come down soon after that. And he inquired as to whether or not such a procedure could be set up in New York.

Q. And what did you respond, if anything?

A. Again, I told him that I would make inquiries as to whether or not it was feasible.

Q. Did he make any further comments or any further requests to your recollection?

A. Not to my knowledge.

Q. What did you do following that conversation relavant to your statement that you would make further inquiries?

A. I discussed it with various members of the Securities Bureau who were involved in the takeover, you know, the administration of the Takeover Statute.

Q. Then did you have any further contact with any representative from Great Western United, or did anyone else?

A. Yes. I believe I called—I attempted to get [161] in touch with Mr. Pirie at his New York offices in the afternoon of that same day, Thursday, March 24th. I was informed he was in Washington. Later that day Mr. Pirie called, I suppose, from Washington, and we had a conversation.

Q. And what was the subject matter of that conversation, what he said to you and what you said to him?

A. I believe I started off the conversation by stating that New York was not in a position to hold an evidentiary hearing similar to the one proposed in Maryland.

Mr. Pirie then asked me that should Great Western United file a statement under the Securities Takeover Disclosure Act with New York, could there be an expedited hearing under the provisions of the Securities Takeover Disclosure Act.

Q. What did you respond to that?

A. I responded that I had not, you know, I had not seen the filings to be made—possible filings to be made with our office, and I couldn't comment upon the gist of what was in those filings that may or may not have, you

know, brought about a necessity for having a hearing, and that I couldn't comment upon papers that had not been submitted to me. I believe at that time the conversation ended.

[162] Q. Was there any further contact between Great Western United, representatives for Great Western United and your office of which you are personally aware?

A. Yes, there were.

Q. When was that next contact?

A. That same afternoon, Thursday, March 24th.

Q. And what was the nature of that contact?

A. Mr. Martin Weber placed a call to—at first he was going to call Mr. Pirie until I informed him that his call had been made from Washington and was out of town. Mr. Weber thereupon called Mr. Strom in that firm from his office.

Q. How are you personally aware of that phone call?

A. I had discussed my—my conversation with Mr. Pirie among members of the office, including Mr. Weber and the chief of the Securities Bureau.

Q. What is his name?

A. His name is Orestes Mihaly. Mr.—at the conclusion of that meeting between members of the office Mr. Weber decided to call Mr. Strom, and he asked me to accompany him back to his office in order to listen in to the conversation he was to have.

Q. Did you listen on the phone?

A. No, I did not listen on the phone. I merely [163] was present in his office, and I only heard Mr. Weber's end of the conversation.

Q. But Mr. Weber affirmatively wanted you to hear what he, Mr. Weber, was going to say?

A. Yes, since I had been in fact with Mr. Pirie we wanted a—

Q. Is this the—do you believe this is the conversation referred to in general by Mr. Strom in his testimony this morning?

A. Yes.

Q. Did you head that testimony?

A. Yes, I did.

Q. Did you hear anything that Mr. Strom said to Mr. Weber on the afternoon of March 24th?

A. No, I did not.

Q. Did you hear what Mr. Weber said to Mr. Strom?

A. Yes, I did.

Q. Did you hear everything that Mr. Weber said to Mr. Strom?

A. Yes.

Q. Could you give us your version of that one side of the conversation?

A. Mr. Weber said that the position of our office had not changed, and that we were still leaning toward jurisdiction. I don't know if he understood those [164] exact words.

He thereupon said that for Great Western's own strategy concerning the takeover it might be better to file with New York in order to start the statutory twenty day waiting period running immediately.

Q. Did Mr. Weber—have you seen Plaintiff—I am sorry, Defendant New York City Exhibit 1 which is Mr. Weber's Affidavit which was filed this morning?

A. Yes, I have seen it.

MS. JUVILER: Can you give a copy of that Exhibit to the witness. That's New York No. 1. Thank you very much.

MR. CONANT: Excuse me, Your Honor. For the record we will again object to any references made to this Affidavit which we do not believe is properly in evidence and in order to prevent interrupting any more, may I have a running objection to that, continuing objection to that?

THE COURT: All right.

Q. (By Ms. Juviler) Do you have—is there any part of this Affidavit that does not accord with your memory of that conversation?

A. No, there is not.

Q. Did you hear Mr. Strom's testimony this morning and afternoon, I guess he testified both?

[165] A. Yes, I did.

Q. You did. Have you spoken to Mr. Strom about this Great Western United proposed filing previously?

A. No, I have not.

Q. From listening to Mr. Strom's testimony do you think that your understanding of the conversation and Mr. Strom's understanding of the conversation could have been different?

A. Yes.

MR. CONANT: I'll object to that, Your Honor. I think what the witness may believe is immaterial, irrelevant.

THE COURT: I'll sustain it.

[166] Q Did Mr. Weber to your memory refer to the prior conversations you had with Mr. Pirie?

A Yes.

Q As part of the conversation? What was the relevance of the reference to the prior conversations of Mr. Pirie as you heard the statements by Mr. Weber to Mr. Strom?

A Well, I had informed Mr. Weber of all my conversation with Mr. Pirie. I believe that he thought that I may have not left it properly with Mr. Pirie that we did not foresee the possible, you know, the necessity of a hearing to be held under this, under the statutes.

MR. CONANT: Your Honor, I object to that answer and this line where the witness is speculating on what it is that Mr. Weber may have thought about how it is that this witness left matters with Mr. Pirie. I think we're getting awfully far afield.

THE COURT: Sustained as to what his opinion is as to what are—what Mr. Weber thought on that particular occasion.

MS. JUVILER: I wasn't asking what Mr. Weber thought but what the relevance of—the reference to the prior conversations was to his understanding [167] of Mr. Weber's statement. It's really not—not terribly important.

Q (By Ms. Juviler) Mr. Dugan, do you know whether or not a determination was made by the Attorney General of the State of New York whether or not to assert jurisdiction over Great Western United Corporation?

A Yes, I do.

Q Was such a decision made?

A No, there was never such a decision.

Q Were you ever informed that the Attorney General had made such a decision?

A No, I was not.

Q Were you ever informed that the First Assistant Attorney General had made such?

A No.

Q Were you ever informed that Mr. Mihaly, the head of the Securities Bureau, had made such a decision?

A No.

Q Were you ever informed—

THE COURT: By anybody.

Q (By Ms. Juviler) That Mr.—well, let me—one crucial man, Mr. Weber had made such a decision?

A No, I was not.

Q Did you contact Great Western United thereafter [168] with regard to this tender offer?

A No. I had no conversation with representatives of Great Western.

Q Did they contact you thereafter?

A No.

Q To your knowledge did Great Western United contact any of your superior, or Mr. Weber's superiors with regard to that conversation?

A No.

Q Were any contacts—was any action taken after March 24 with regard to the Great Western United proposed tender offer?

A On March 25, that Friday, Mr. Mihaly told me in the afternoon to call the attorneys for the target company, Sunshine Mining, to arrange to have their financial, Chief Financial Officer, whose name is Mr. Lipka—

THE COURT: Lipka?

THE WITNESS: Lipka, (spelling) L-i-p-k-a, I believe is the spelling,—

A —to arrange with Mr. Lipka to come into our office and to give sworn testimony concerning juris—facts which would bear on the question of whether or not to assert the new—the New York State Attorney General should assert jurisdiction.

[173] the way?

A I was asleep.

Q Where?

A On—in Rockwell Center, Long Island.

Q Then what did you do?

THE COURT: You mean—you want to prove he got down here?

MS. JUVILER: But how he got down here and what it's like to come here and testify in these minor matters when we have to testify in the Northern District of Texas about a telephone conversation that occurred in New York when all the parties to it were in New York and available in New York.

THE COURT: If it was so minor he shouldn't have been here.

MS. JUVILER: It's minor but if you're properly defending your client and this one is relevant,—

THE COURT: If it's so minor I'll disregard his testimony, if you want me to.

MS. JUVILER: Your Honor, I make an offer of proof. If you're objecting to this testimony—

THE COURT: I'm not objecting to it. You implied this was a minor matter, and if you think [174] the man has been inconvenienced on a minor matter, you didn't have to bring him down here.

MS. JUVILER: It was a minor event in a case which might have many minor events, most of which will occur outside of this jurisdiction and involve many witnesses. We were told with some heat about Mr. Strom's inconvenience. We didn't inconvenience Mr. Strom. Mr. Strom came here from New York—

THE COURT: I'm not concerned if the witness was inconvenienced, really. I appreciate the fact he is here and I got his version of this conversation.

MS. JUVILER: And also I wanted to explain why there was no question that Mr. Dugan is quite tired today.

THE COURT: I'm tired, too, so I'm sure he's tireder than I am.

MS. JUVILER: We all are. He was compelled to appear here. He was compelled to appear here, and maybe some of us are here voluntarily. I'm not. But some of us are.

THE COURT: You what? You what?

MS. JUVILER: I'm not here voluntarily. I'm here pursuant to the command of the Southern [175] District of New York that I make a motion to dismiss on the basis of jurisdiction here and on the request of the Fifth Circuit that we—we come to argue jurisdiction and venue here, and only for that purpose, and that we make this witness available. Anyway, the fact is that after one o'clock yesterday morning Mr.—

THE COURT: He's—

MS. JUVILER: Mr. Dugan was enroute to this Courthouse.

THE COURT: Yes. All right. Thank you. Anybody else have any questions?

MR. HEISER: None, Your Honor.

THE COURT: Mr. Conant?

[176] CROSS EXAMINATION

BY MR. CONANT:

Q. Mr. Dugan, you said you first got involved in this on March the 22nd, is that right?

A. Yes.

Q. And you were assigned to review a memorandum that had been submitted by this guiding art?

A. Yes.

Q. Do you understand that that memorandum had come to the Attorney General's office and been delivered to the Attorney General's office the previous day on the 21st?

A. Yes.

Q. So there could conceivably have been a meeting of some sort on that date, which you may or may not have know about, is that correct?

A. I was—yes, there could have been.

Q. Tell me, did the Attorney General's office give notice to Great Western about the two scheduled appearances of Mr. Lipka for a sworn statement?

A. Excuse me?

Q. Did your office give notice to Great Western about the scheduled appearances of Mr. Lipka for a sworn statement?

A. No.

[177] Q. Neither when he was scheduled for the 25th nor when he was scheduled for the 31st?

A. No.

Q. Is that correct?

A. That's correct.

THE COURT: Are you required to, to your knowledge?

THE WITNESS: No, we are not.

Q. (By Mr. Conant) I assume that what, Mr. Lipka was going to come in and was going to give a sworn statement, and that was going to help the Attorney General try and determine his jurisdiction, is that correct?

A. Yes, sir. He was going to come in with corporate books and records or whatever was—whatever he deemed appropriate, and we were to ask him questions bearing on those issues.

Q. Well, I had understood that you had previously told Mr. Pirie, I think this was the first of the phone calls that you related took place on the 24th, that the Attorney General's office was not in a position to hold any sort of evidentiary hearing to determine its jurisdiction?

A. We are—this was not to be a hearing. This was to be an investigation which we are empowered to [178] conduct under the New York Act.

Q. Incidentally, you said that Mr. Pirie had asked you to check since substantial assets was in question as to whether or not Sunshine had channeled any funds into New York during the preceding week to bolster its bank account. Did you do that?

A. That was one of the things to be asked of Mr. Lipka.

Q. You were going to ask Mr. Lipka that?

A. Yes.

THE COURT: Is this an investigation, you say, preliminary to determining whether you are going to urge jurisdiction on the tender offer?

THE WITNESS: Yes. Yes.

Q. (By Mr. Conant) I believe that Ms. Juliver said earlier today perhaps in chambers that New York had handled four tender offer filings, is that correct?

A. Yes.

Q. Have you been involved in any of the rest of those?

A. No.

Q. Who principally has been in the Attorney General's office?

A. Mr. Eugene Berman and Mr. Martin Weber.

Q. When you joined that section were you given [179] any education or any counseling about the nature of tender offers, what they were, how they moved and the like?

A. Yes, we were.

Q. Were you made aware of the fact that tender offerors generally like to move those—their tender offers along as quickly as possible once they had announced proposing to make one?

MS. JUVILER: I object to the word "fact." He says it's a fact the tender offerors like to move them along.

THE COURT: Overruled.

A. Yes.

Q. (By Mr. Conant) Do I understand that the Attorney General's office is still now trying to decide whether it has jurisdiction under the New York Act or not?

A. Yes. Mr. Lipka is to give sworn testimony this—on Monday at 10:00 a.m., if he is not—

THE COURT: —engaged elsewhere.

A. —engaged elsewhere.

Q. (By Mr. Conant) So although the matter has been pending for review in your office since March the 21st, the

Attorney General's office has not as yet made any determination as to its jurisdiction?

A. True.

[180] Q. Notwithstanding its non-determination of jurisdiction, however, it has recommended to GWU that it file under the New York Act? I gather that to be the effect of some of the conversations which you have related to us?

A. If GWU wished to have the twenty days mandated by the statute start to run, then rather than wait for a determination on the jurisdictional issue an immediate filing would start those twenty days running, and if full and fair disclosure were made, then at the end of that twenty days that tender offer could be—could go effective in New York.

Q. So Great Western's choice was either to file with the State of New York and thereby trigger an automatic waiting period of twenty days, or to wait what has apparently already now been eighteen days for New York to determine whether or not it has jurisdiction to act?

THE COURT: Some of those days they could get back, he says. You should, too. Go ahead and answer the question. Are those the alternatives they had?

THE WITNESS: Excuse me.

THE COURT: You lost the train?

THE WITNESS: Yeah, I lost the train.

[181] THE COURT: All right. Restate the question.

Q. (By Mr. Conant) Is what you were telling me then is that GWU's alternatives on or about March the 22nd or within two or three days of that, March the 24th, GWU's alternatives were either to file with New York and thereby trigger an automatic twenty day waiting period, or to

simply wait what has now been at least a number of weeks until New York made up its mind on whether or not it had jurisdiction?

A. Those were two alternatives. They could have filed with New York and applied for an exemption from our statute. That's embodied in the statute, as—because the Temporary Restraining Order was issued by this Court, we were—we could not go forward with our investigation into the jurisdictional facts bearing upon the principal place of business and substantial assets. As soon as— as soon as that Temporary Restraining Order was stayed, we once again started to delve into those facts.

Q. So out of the past eighteen days that you have had this jurisdictional question before you there have been five days during which you were restrained from going forward, is that correct?

THE COURT: That's—

A. I believe so.

[182] THE COURT: That's correct, substantially correct.

MS. JUVILER: Well, Your Honor, Mr. Lipka couldn't come on the 29th, so that makes six days because of this action.

THE COURT: Well, that's true.

Go ahead, Mr. Conant.

MR. CONANT: Mr. Lipka couldn't come on the 29th?

THE COURT: Go ahead with your questions. And you can bring that out on your redirect.

Go ahead.

Q. (By Mr. Conant) Turning to the now famous phone call—

THE COURT: 24th?

Q. (By Mr. Conant) —on the 24th, do I properly understand that you were simply sitting in Mr. Weber's office when he called?

A. Yes.

Q. And that he called and asked for Mr. Strom?

A. Yes, I believe. I believe so.

Q. Who is Mr. Martin Strom?

A. Martin Strom?

Q. Yes.

A. I believe he is the member of the—of Skad- [183] den Arps, et al law firm in New York, and a representative of Great Western United at that time.

Q. Mr. Martin Strom is referred to in your Affidavit. Is he somebody different than Mr. Milton Strom who appeared here today?

THE COURT: Have you ever met—

A. No, I have not met Mr. Strom.

Q. (By Mr. Conant) So, then, where did you get the name Martin Strom that's in your Affidavit that you filed with this Court pursuant to your Motion?

A. I believed that his first name was Martin, unless—

Q. So then can you be absolutely sure that the telephone call you are relating which you believe occurred to a Martin Strom is the same telephone call that Mr. Milton Strom testified to here today?

A. Yes, I am sure it's the same phone call.

Q. Pardon?

A. I am sure it's the same phone call.

Q. Although you are not sure whether it's the same man. I take it, you said you didn't listen to the man on the other end.

THE COURT: Did not.

A. No, I did not.

Q. (By Mr. Conant) I assume that that phone [184] call, like most phone calls on either end, consists of a lot of yeses and nos, I don't knows, short form non-entire sentence responses, or do you recall?

A. No, there were some.

Q. Were there such responses that you could hear from Mr. Weber?

A. Yes.

MS. JUVILER: Could we clarify the question, what kind of responses, yeses or nos or long form responses?

Q. (By Mr. Conant) Anything that was not a complete sentence, did you hear any yeses from Mr. Weber?

A. I don't recall, you know, specific—

Q. Any nos from Mr. Weber?

A. I don't recall specifically.

Q. You don't know, in short, what the man on the other end of the line was asking Mr. Weber, or if he asked Mr. Weber anything to which Mr. Weber was responding?

A. No, I was not a party to the—

THE COURT: He didn't hear that end of the conversation, so obviously he doesn't know what was said.

[185] THE COURT: Anything else?

CROSS EXAMINATION

BY MR. CONANT:

Q Did I understand that on March 23 you, yourself, told Mr. Pirie that the Attorney General's office was, I think your words were, leaning toward finding jurisdiction?

A Yes, I informed Mr. Pirie, and I used those exact words, leaning towards finding jurisdiction.

Q All right. And that was a statement that you made to him, what, after consulting with other members of the office who had likewise reviewed the memorandum?

A Yes.

Q And that was a true statement at the time made to the best of your knowledge?

A Yes, it was.

Q And I believe that you testified, assuming your version of what Mr. Berman said to Mr. Strom is correct, he also stated to Mr. Strom the Attorney General's office was leaning toward taking jurisdiction?

A That was the gist of Mr. Weber's words. I don't know if he used that—

THE COURT: Words to that effect?

THE WITNESS: Words to that effect.

Q (By Mr. Conant) And that he suggested that [186] Great Western go ahead and file—

THE COURT: Yes. He's testified that's what he said.

MR. CONANT: Yes.

Q (By Mr. Conant) Are you still leaning toward taking jurisdiction?

A Yes, I would say so.

MR. CONANT: Pass the witness.

THE COURT: All right.

MS. JUVILER: I just have one question on redirect.

REDIRECT EXAMINATION

BY MS. JUVILER:

Q Did you notify Sunshine Mining Company or its representatives of your contact with Great Western United?

A Excuse me?

Q Did you notify Sunshine Mining Company or its representatives of your contact with Great Western United?

A No, I did not.

Q Okay.

MS. JUVILER: No further questions.

THE COURT: We're going to excuse him. Is that agreeable?

Transcript of trial proceedings:

In the United States District Court
for the Northern District of Texas
Dallas Division

Civil Action No. CA 3-77-0405

Title Omitted in Printing

BE IT REMEMBERED that commencing on May 23rd, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[2] APPEARANCES:

HON. A. B. CONANT, JR. and
HON. IVAN IRWIN, JR.
APPEARING FOR THE PLAINTIFF

HON. JAMES KAUFMAN and
HON. ELLIS McKAY and
HON. WILLIAM H. STEINBRINK
APPEARING FOR THE DEFENDANT,
STATE OF IDAHO

HON. AMY JUVILER and
HON. EUGENE D. BERMAN and
HON. WILLIAM S. DUGAN
APPEARING FOR THE DEFENDANT,
STATE OF NEW YORK

HON. MARK MARTIN and
HON. FRED FOWLER
APPEARING FOR THE DEFENDANT,
SUNSHINE MINING CORPORATION

[3] PROCEEDINGS

May 23, 1977
9:32 A.M.

• • •

[12] • • •

MR. CONANT: All right, Your Honor, let me first ask, do I understand that the Court is going to take notice of all prior hearings, testimony and exhibits in past hearings in connection with this cause?

THE COURT: Yes, we will take notice of those. Now, there were some reservations made at those earlier hearings by the Defendants relating to cross examination of those witnesses and those rights are still reserved at this time until they've had an opportunity to—I think there were one or two witnesses where there was no cross examination.

MR. CONANT: That's correct, Your Honor, but we—of course, the Plaintiff offered that testimony generally—

THE COURT: I take—

MR. CONANT: —at that time.

THE COURT: They have that right to develop the testimony that they want from that witness by cross examination. They still have that right reserved but you may go ahead.

We will take into consideration [13] at this time all that former testimony.

• • •

Transcript of trial proceedings:

Testimony of David Wagnon, witness on behalf of Plaintiff—Direct examination

[14] • • •

DAVID WAGNON,

called as a witness in behalf of the Plaintiff, being duly sworn, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. CONANT:

Q. Will you state your name, please, sir?

A. David Wagnon.

Q. Mr. Wagnon, how are you employed?

A. By Great Western United.

Q. In what capacity?

A. I'm Vice President of Great Western United.

Q. All right, sir. Mr. Wagnon, have you taken part in any of the activities surrounding Great Western's proposed tender offer for shares of the stock of Sunshine Mining Company?

A. I have participated in the various parts of that.

Q. Have you had anything at all to do with the compilation of the names, addresses of shareholders of the target company, Sunshine?

A. To a limited extent.

Q. Were you in attendance at a hearing in [15] Spokane?

A. I was.

Q. And what was the function of that Court hearing?

A. It was a suit on behalf of Great Western United requesting or requiring that Sunshine produce a stockholders record.

Q. Was Sunshine required to produce its stockholder list?

A. They were.

Q. Was that stockholder list delivered to you at Great Western by Sunshine?

A. It was not delivered to us by Sunshine. It was delivered, I believe, to their law firm of Freed, Frank. There was a copying attempt made at the offices of Freed, Frank, I believe that's correct. Their copying machine broke down—

THE COURT: Wait a minute. Were you just concerned about getting a copy of the list?

MR. CONANT: That's right.

THE COURT: Well, we wouldn't care about the copying machine.

In any event, did Great Western acquire from Sunshine a copy of the Sunshine shareholders list?

[16] A. Yes.

Q. Was that simply a list of paper or would you describe the form in which that came to you?

A. They were photostats of the stockholders of record as of December 20, 1976 and a photostat of the transactions that followed through March 28th. It was a photostatic copy I would say some twelve, fourteen inches thick.

Q. All right. Did you thereafter retain anyone to put that in—put that shareholders list in a form usable for Great Western's proposed tender offer?

A. We did.

Q. Who did you retain for that purpose?

A. Mr. Chris Murray.

Q. What was Mr. Murray to do for Great Western?

A. Mr. Murray was to take the material that we were provided by Sunshine and to put it into a workable order and to verify that the material that was given to us was in fact accurate at least as far as the materials themselves were accurate that were required by Sunshine and I believe Chase.

• • •

Transcript of trial proceedings:

Testimony of Jeffrey B. Bartell, witness on behalf of Plaintiff—Direct examination; Cross examination at p. 72; Redirect examination at p. 105

[43] • • •

DIRECT EXAMINATION

BY MR. CONANT:

Q Would you give your name, please, sir?

A Jeffrey B. Bartell, (Spelling) B-a-r-t-e-l-l.

Q Mr. Bartell, how are you presently employed?

A I'm a Commissioner of Securities for the State of Wisconsin.

Q What is your educational background, Mr. Bartell?

A I have a degree in economics from the University of Wisconsin and a law degree from the University of Wisconsin Law School.

Q When did you graduate from law school?

A 1968.

Q Was that with honors?

A Yes, it was.

Q Following your graduation from law school how were you employed?

A I was employed for approximately three and a half years as an Assistant Attorney General for the State of Wisconsin.

Q And following that what did you do?

A I served for a little over a year as counsel [44] to a task force created by the Governor of Wisconsin to study the judicial of Wisconsin and make recommendations for restructuring of the courts.

Q All right, sir, and how long did you hold that position?

A About thirteen months.

Q And from that what did you do, following that?

A I was appointed Commissioner of Security in December of 1972.

Q Mr. Bartell, is it accurate to say that you are here by virtue of an agreement to come more or less under the threat by attorneys representing Great Western to otherwise take your deposition?

A That is correct.

Q And you were served with a subpoena when you got here; is that correct?

A That is correct.

Q Mr. Bartell, do you do any teaching or handle any seminars?

A I do some lectures at the University of Wisconsin Law School in Securities Law and Administrative Law.

I also have been appointed to the faculty of various American Bar Associations, American Law Institute [45] Seminars and institutes dealing with various securities

matters and in particular some matters involving corporate takeover.

Q Are you a member of any associations of administrators or persons connected with the securities business?

A Yes, I am. I am a member of the Central Securities Administrators Counsel which involves the nine states in the SEC Region IV.

I am a vice president of the Midwestern Securities Commission Association which is an association of twenty-eight states ranging from Ohio westward and I am also vice president of the North American Securities Administrators Association which is the organization comprised of the fifty states and the Canadian provinces, the securities administrators of all those states and provinces.

Q You said you were a vice president of both the Midwest and North American society?

A Yes, sir.

Q Do you act as an advisor to any groups interested in the securities regulation business?

A Any groups interested in—I'm sorry?

A Any groups, committees, associations interested in security regulation provisions and laws?

[46] A Yes. I am a member of the Advisor Committee on the proposed Federal Securities Code which is a new—it's a project commenced by the American Law Institute in 1968 for the purpose of codifying the Federal Security Laws into a single code.

Professor Loss of Harvard is the reporter for that project and I am one of twenty-two or so advisors to Professor Loss on that project.

Q Mr. Bartell, does Wisconsin have a State Takeover Act?

A Yes, it does, sir.

Q You are aware, are you not, that involved in the case at bar are the State Takeover Acts of Idaho and New York?

A Yes, I am.

Q Have you compared the Wisconsin act with either or both of those acts to determine their similarities or dissimilarities?

A I have compared Wisconsin law to both the laws of both those states.

Q Have you found that the Wisconsin act is similar to either?

A Yes. The Wisconsin act is almost identical to the Idaho law.

It bears some similarity to the New York law [47] but not near as much.

Q When did Wisconsin pass its Takeover Act?

A It became effective in July of 1972.

Q Do you know whether that was the first or the second or the third state to pass its takeover act, do you know whether chronology of Wisconsin is?

A Yes. Wisconsin was the fourth state in the nation to enact a corporate takeover law and the second state whose law involved a registration requirmement for corporate takeover.

Q It was passed in the same year that you became the Securities Commissioner of Wisconsin?

A That is correct.

Q Do you know how your tenure as the Securities Commissioner dealing with State Takeover Acts compares with those in similar positions in other states?

A I haven't made a person by person count, but I suspect that I have administered state takeover law longer than—longer than just about every other state securities administrator.

• • •

[49] • • •

Q (By Mr. Conant) Mr. Bartell, have you had [50] any filings under the Wisconsin Act?

A Yes, sir.

Q How many such filings?

A Under the Wisconsin Act we have—there are two parts to it.

There is a requirement that—for ownership information in the filing. We have had a great many of those. That filing is required when someone acquires in excess of five percent of the outstanding equity securities of the target company as that term is defined under the Wisconsin law.

The second part of the Act involves filings of the registration statements relating to corporate takeovers. We have, since the Act took effect in July of 1972, had, I believe, four filings under that section of our law.

Q Have all of those come under the category of being unfriendly tender offers?

A Talking about the latter category of filing?

Q Yes, those falling under your registration provision.

A No. I would say only one of the four could be fairly called an unfriendly corporate takeover.

Q Does the Wisconsin Act like that in Idaho [51] provide that the only tender offers that need be registered are those in which the management of the target company has not recommended the acceptance of the offer by the shareholders?

A That is correct. Under the Wisconsin law a proposed transaction in which the target company by its board of directors recommends acceptance to the shareholders is excluded from the definition of takeover.

Q Would you explain to me briefly why you say that three of the four registrations under the Wisconsin act were not considered unfriendly?

A Yes. Those three involved post transactions in which a segment of management or a segment of the persons who were affiliated, previously affiliated with the company, sought to by their publicly held shares to take the company private.

The only reason that the transaction was subject to the Wisconsin corporate takeover law was that the board of directors in exercise of its best judgment and fiduciary responsibility did not choose to recommend acceptance of the offer to the shareholders. So, the transaction was subject to the regulation provision of the takeover law.

Q So, three of the four registrations really was just between affiliates or closely related companies of [52] some sort?

A That is correct.

Q With regard to the fourth registration, the one in which you characterized as an unfriendly tender offer, would you give the Court briefly the history of the administrative procedure?

A Yes.

[53] A. Yes. This transaction involved a target company by the name of EZ, letters, EZ Painter, P-a-i-n-t-e-r (spelling), a Wisconsin corporation. It was a Delaware corporation with a principal office in Wisconsin and substantial assets in Wisconsin which was the target of a takeover attempt by a firm known as Nuon Companies, Inc., Freeport, Illinois.

The takeover registration statement was filed on December 5th, 1972. It was the week before I was appointed Securities Commissioner. And a request for hearing was filed with me on the morning that I walked into the office, December 11th, 1972.

Under the Wisconsin law and I believe under the Idaho law, a target company has a right to request a hearing before the Securities Commissioner, in which case under our statute and I think Idaho's, the Commissioner is obliged to hold a hearing.

I called a hearing in that case on the 15th of December and held several prehearing conferences within the next week. And a hearing then, five-day hearing transpired during the week of—I believe it was the week of December 20 or so, just before Christmas. The parties presented—both the target and the prospective offeror presented evidence. As I say, it lasted almost five days. Both sides [54] provided me with briefs and I issued an order and a decision on January 30th, 1973 registering the takeover. The takeover then proceeded and was successfully concluded in late March of 1973.

Q. Then I take it by virtue of the administrative proceedings, which sounds like you were doing everything you

could to expedite, the offer was held up for a period of about eight weeks or so?

A. That is correct.

Q. During this eight-week period were there any actions taken or threatened by the target company which might have had the effect of foreclosing the offer entirely?

A. Yes. There were a number of actions taken by the target company. There were several lawsuits brought in Federal Court challenging the legality of the proposed transaction under federal securities laws, the state securities laws and federal antitrust laws. There were—I believe that there was a state court action brought by the target as well on state grounds and the target company also proposed to arrange a merger during that period with a company that is headquartered in New York, pursuant to which the target, EZ Painter would have issued approximately 500,000 shares of previously authorized but unissued [55] securities, equity securities, to this prospective merger partner.

Q. Is that the sort of transaction that's known in securities parlance as a defensive merger?

A. I've heard it referred to in that manner.

Q. And did that defensive merger actually take place?

A. No, it did not.

Q. Why not?

A. Well, I can't say for sure why, all of the reasons that went into the target's decision not to proceed with the transaction. One factor, one thing that may have been a factor was that when the target informed me of these negotiations involving a prospective merger partner whose name had not been previously been involved in any of the

administrative proceedings or judicial proceedings had informed me of the nature of the merger that was contemplated which would not have required the vote of the target's shareholders in order to accomplish, I indicated to the target company through its lawyers that I considered that transaction as I understood it to be possibly a violation of the antifraud provisions of our corporate takeover law. And that I had an intent to review the transaction if it proceeded, with the [56] possibility of bringing an action in the circuit court for Damon County, Wisconsin to enjoin it as a violation of the Wisconsin corporate takeover law.

Q. That appeared to play a factor in their not going forward with a defensive merger, I take it?

A. I can't really say.

Q. Do you know incidentally whether the anti-fraud provision in the Williams Act likewise prevented a defensive merger of the sort that you've described?

A. Well, I don't think explicitly by the terms of Section 14(e), but I have read a recent case in which the Court—I think it was a Federal District Court held that a defensive merger of similar—in some respects to the one I've described, involved a transaction with no justifiable business purpose and without undertaking—without due diligence and in violation of the fiduciary responsibilities of it to the shareholders of the target constituted the violation.

MR. McKAY: If I may, I would like to ask that the last answer be stricken as I believe it deals precisely with the witness's interpretation of a reported case and nothing more, as I heard the answer.

THE COURT: I will sustain the [57] objection as far as it relates to his interpretation of the case.

Q. Mr. Bartell, have the State Takeover Acts in general become a subject for some scrutiny by the associations of which you are a member?

A. Yes, they have.

Q. Has the North American Securities Administrators Association undertaken any form of study of the State Takeover Acts?

A. Yes, they have. The North American Securities Administrators Association has created a committee consisting of all of the—when the committee was appointed it consisted of all of the states having a State Takeover Law and that number has increased since the time the committee was created, to review—review the various State Takeover Laws and to attempt to resolve some problems with those laws and to achieve, if possible, a degree of uniformity which is uniformity being the primary—uniform regulations being a primary objective of both of the Associations to which I'm referring.

Q. I take it then you are a member of that committee?

A. Yes, I am.

Q. And who, incidentally, is the chairman [58] of that committee?

A. Chairman of the North American Securities Administrators Association Committee on State Regulated Corporate Takeovers is Mr. Mihaly of New York.

Q. What, if anything, has that committee done to date? Is that—well, excuse me, let me withdraw that.

When was that committee appointed?

A. I believe the committee was formed, was appointed in September or October of 1976.

Q. And what activities has that committee taken since its formation?

A. The committee has—members of the committee have met with members of the staff of the Securities and Exchange Commission with respect to subject matter of the committee's inquiry, and have exchanged some correspondence on the subject and done a little research on the experience of the various states under their respective statutes.

Q. To the best of your knowledge, has there been any report rendered by that committee as yet?

A. No, there hasn't.

• • •

[59] • • •

Q. (By Mr. Conant) Mr. Bartell, I think when we broke we had discussed a committee appointed by the North American Securities Administrators Association. Has there been similar work concerning the State Takeover Acts done by the Midwest Securities Administrators Association?

A. Yes, sir, there has.

Q. What has been the nature of the work done in that association?

A. Well, the Midwest Securities Association has likewise appointed a committee of the association to study the proliferation of State Takeover Laws and try to—try to develop some proposals for uniform regulations in that area. That committee is chaired by Commissioner Larson, State of Minnesota.

Q. Are you likewise of that committee?

[60] A. Yes, I am.

Q. I take it then from the intention, when these Acts are perceived in these associations there is considerable discussion among the administrators in the committee meetings and generally about the nature and effects of the State Takeover Acts?

A. Yes, I would say so.

Q. Also, you have characterized these—well, what you call a proliferation of the State Takeover Acts, would you expand on that for me? What you mean by the proliferation.

A. Well, it wasn't more than eighteen, twenty months ago that we only had about eight or ten of these laws in the country. Now we have, by my latest count, I think it's twenty-eight. That's what I mean by proliferation.

Q. In connection with your work in the association or on these committees do you make an attempt to review these laws as they come out and—

A. I try to.

Q. —compare them with your own and with others?

A. Yes, sir.

Q. In your study of this topic, both individually and in connection with other administrators, have [61] you reached any conclusions concerning the identity of the supporters of the State Takeover Acts in these various states?

MS. JUVILER: Your Honor, I object to this question as irrelevant. When the validity of a statute is at issue, the motivation of the legislature isn't the concern of the Court.

THE COURT: I think the motivation of the legislature would not be. Why don't you rephrase your—is that what you're inquiring into, who's lobbying for them?

MR. CONANT: Yes, Your Honor. As a group, what group generally lobbies for the State Takeover Acts.

THE COURT: I will let him testify if he knows who might be lobbying for—

MR. McKAY: Your Honor, now that the question has been clarified I would like to, if I may, also object and would like to suggest, if I may, that I believe there is substantial law to the effect that that kind of legislative history is not admissible as legislative history even if we were focusing on the meaning or intent of a specific [62] statute. But, as I heard this question it was a general question about state statutes generally which I think makes it therefore doubly objectionable. I don't see where it could lead us on the issues of this case.

THE COURT: I'm going to overrule the objection and limit his answer to the question that I've suggested.

What you're asking about, who sponsored or lobbies for the particular Takeover Statutes.

A. Well, the history of the Wisconsin law which is the one I'm most familiar with, indicates that the law did not, unlike most other security related legislation in Wisconsin, the Wisconsin Corporate Takeover Law did not originate in the office of the Commissioner of Securities for the State of Wisconsin. It was introduced at the request—the history indicates that it was introduced at the request of several Wisconsin firms by the legislators who represent the districts in which those firms were located.

MR. McKAY: Your Honor, if I may, I would move to strike that. I can't conceive that who pushed a Wisconsin statute has anything to do with the constitutionality of an [63] Idaho statute or New York statute.

THE COURT: I'll overrule the objection.

Q. In connection with your work and study of the State Takeover Acts in connection with your association otherwise, have you reached any conclusions about whether it is generally true of the State Takeover Acts that they have been enacted at the instance and with the active support of local industry?

MR. McKAY: Objection.

THE COURT: Overruled.

MS. JUVILER: Your Honor, I have a further objection in that I would like to base it for this witness's knowledge, if any, of who was—the background of other state statutes since he indicated that he was most familiar with Wisconsin.

THE COURT: I will let you develop that on cross. Overruled.

A. It is my impression from my discussions with other state securities administrators and my review of legal periodicals dealing with the subject that in many instances this legislation, legislation of this type does not initiate with the state securities legislature but initiates with firms that believe the legislation will be advantageous to them within that [64] state.

I think that as an example, the State of Ohio in which it is reported by ex-Securities and Exchange Commissioner Al Summers, that that is the manner in which one of the first of the state laws was enacted in that state.

THE COURT: Some of the Acts are initiated by the security administrators or commissioners?

THE WITNESS: Some of them are. I can't think of any right offhand but I believe that to be a fact.

THE COURT: Thank you.

[65] Q. (By Mr. Conant) Again, Mr. Bartell, from your work as securities administrator in the State of Wisconsin and from your activities with your associations in studying Takeover Acts, have you reached any conclusions concerning the effect of such Acts on takeover offers? By that, let me elaborate, if I may, on the number of takeover offers or encouragement or discouragement of takeover offers?

A. Yes, the number of takeover offers throughout the country since the Wisconsin Corporate Takeover Law was enacted has increased in each year. As I mentioned previously, the only contested takeover in Wisconsin occurred in very late '72 and early '73. I think it would be reasonable to conclude that the Wisconsin law has an effect of or has perhaps until recently had an effect of deterring corporate takeover offers in our state. I think that the proliferation, as I called it, of State Takeover Laws in the last year or two has perhaps changed the equation with respect to the effect of the laws, and it is possible that with more than half of the states having Corporate Takeover Laws now, it would be reasonable to conclude that new rules are in effect and that respective offerors have learned to deal with State Takeover Laws Perhaps the deterrence is not so great in recent years.

[67] Q. In connection with your association work and study of the State Takeover work, have these committees

which you have described isolated any administrative problems that they see in the State Takeover Acts, both individually and taken as a group?

A. Yes, they have.

Q. What problems principally have been isolated?

A. Probably foremost is the problem of defining a subject of a takeover attempt, sometimes called a target company, sometimes called the subject company. In various states, this entity is defined in terms of its—the location of its incorporation, where it's organized, the location of its principal office or executive office or principal place of business, whether or not it has substantial assets in the state or a substantial portion of its assets in a state, whether or not it has securities which are registered under that state's security law or are registered under Section 12 of the Exchange Act, whether it does business in the state and a number of other criteria and depending on the use of the conjunctive or disjunctive, there is a variation of how these factors fit together in the respective state laws. That's one area in which some uniformity has been sought by these committees.

[67] Q. Do the Acts which use the term substantial assets generally have any definition of that term?

A. Wisconsin does not, and, to my knowledge, most states' laws do not have further elaboration of that term, and that's another second area in which the committees of these organizations are working. It is virtually impossible before the commencement of a takeover offer to determine—for an offeror to determine what states might have or might assert jurisdiction in the transaction, and this is by virtue of the fact that many of these terms are vague

in respect to the meaning of substantial assets or substantial portion of the assets or the meaning of executive offices, for example.

Q. Due to the absence of definition and the differences in definitions in the various statutes, is it entirely conceivable that more than one state may assert jurisdiction under its Takeover Act over any administrative tender offer?

A. Oh, yes.

Q. What other problem areas, if any, have your associations and committees isolated as administrative difficulties?

A. Well, among the topics under review by these committees are the procedures that are employed [68] by the state regulator in reviewing a registration of a corporate takeover, such things as the waiting periods, the preoffer filing requirements, the hearing requirements, time in which a hearing has to be held and the time after which a decision has to be rendered and the judicial review of the decision. That's one broad area.

Another related area is a provision that's found in at least ten or eleven, perhaps twelve state laws that requires—including Wisconsin's and Idaho's, that requires the administrator to hold a hearing at the request of the Board of Directors of the target company, provisions relating to proration rights, withdraw rights and various rights comparable in some respects to provisions of the Williams Act, Federal Williams Act, but—and I think comparable, exactly comparable in Wisconsin and Idaho, but in other states, there have been some deviations from those provisions and uniformity there is also an objective

of the study. There are various other provisions of the state laws that are under scrutiny by these committees with the objective of achieving uniformity.

Q. What is the administrator's concern with the mandatory hearing provisions to which you alluded?

[69] A. In that respect, I can only speak for myself, and that is that I see no reason why target companies' Board of Directors should have an absolute right to the state administrator to hold a hearing if the state administrator, in his discretion, feels that a hearing is not required.

Q. You mentioned that you were—the administrators were also concerned with their procedures, including the time periods involved.

A. That's correct.

Q. What is the administrator's concern with the time periods?

A. Again, I can't speak for the other administrators. There has been no formal report of either of these committees. My concern is that the time periods which vary between states are, in many instances, inconsistent so that if a number of states are asserting jurisdiction in respect to a particular transaction, the offeror would have a difficult time either knowing what to expect as far as a decision is concerned or arranging financing and other plans in connection with the offer. The inconsistencies of the procedure are the factors that concern me.

Q. Mr. Bartell, am I correct that in your state, there is a provision that the offer or that [70] there is to be publication at the time that the registration statement is filed with you?

A. That is correct.

Q. And there is, I believe, a similar provision in the Idaho Act. Is that correct?

A. That's correct. It's publication of what is essentially a tombstone or a brief description of the proposed transaction, and then a disclaimer saying that this transaction has not been registered in the State of Wisconsin, Idaho and is not effective until it is.

Q. Is that same provision in all of the State Takeover Statutes?

A. No.

Q. Is it then conceivable that such a publication under your Act or Idaho's Act could actually constitute an offer without registration in some other state?

A. It is conceivable that another state would so interpret that advertisement.

Q. You mentioned earlier that you were on the advisory committee to the American Law Institute Recodification of Securities Laws. Is that committee concerned principally with federal securities laws?

A. Yes, the project is designed to integrate [71] into one code the various federal securities laws as amended but as originally enacted between 1933 and 1940, and the primary emphasis is on federal law, federal securities laws.

Q. Has that committee turned its attention to the question of the State Takeover Acts?

A. Yes, the draft of the proposed federal securities code includes a section that deals with the relationship between federal and state regulators in the securities area. That section was drafted about three years ago, perhaps

four years ago now at a time when there were probably no more than six or eight, maybe not even that many, four to six State Takeover Laws.

In that draft of the federal securities code, proposed, in assigning the regulatory responsibility, either of—over securities to either the Federal Government or the State or to both, that code chose to assign that responsibility in the takeover area to the Federal Government and to exclude the States.

Q. Then the draft recodification would specifically preempt the State Takeover Acts?

A. As it was originally drafted. That is a tentative draft, that's correct.

[72] Q. Is that still in whatever tentative draft is currently before that committee?

A. It is still the proposal that's in the tentative draft.

Q. When is that draft expected to be found?

A. As I understand it, Professor Laws (sic) is anticipating a final draft of the entire Code within the next year unless there are unforeseen problems, in which case it will be in another year or after that. The Code has to be approved by the American Law Institute which meets once a year in May.

Q. Do I properly assume that that draft as prepared by that committee was based upon some business considerations or considerations from a business standpoint of the effect of the takeovers, State Takeover Acts on corporate tender offers?

A. The reporter's comments to that section of the Code would indicate the reasons why that section was included in the Code. I was not a member of the advisory

committee at the time that that provision was drafted. It was drafted, I believe, in 1973. I became a member of the advisory committee in 1974.

MR. CONANT: Pass the witness.

CROSS EXAMINATION

BY MR. McKAY:

[73] Q. Mr. Bartell, I was interested in what Mr. Conant said early on that you were here in order to avoid being deposed or something like that. Was that an accurate statement?

A. Not exactly. The choice that was put to me was to have a deposition taken yesterday afternoon in Madison, Wisconsin, or to appear here before the Court today, and I chose to come here.

Q. Okay. As I understand your testimony, sir, apart from your general experience as Securities Commissioner in Wisconsin on things other than tender offers, and we recognize your high standing in the fraternity, your experience with tender offers has been limited to one unfriendly or contested tender offer; is that right, sir, plus three which were not unfriendly or hostile. Is that correct?

A. That summarizes the filings that have been made in Wisconsin.

Q. The filings which have been made in Wisconsin

A. That's correct.

Q. During your administration?

A. At any time since—

Q. And have you had any experience with respect to tender offers other than those on which filings have been made in Wisconsin?

[74] A. Oh, yes, I have consulted with persons who have come into the office to discuss the applicability of the State Takeover Law and the procedures that would be followed if a filing were to be made and the nature of the administration of the law, although the four cases that I mentioned were the only ones that were actually filed.

• • •

[75] Q Do I correctly understand that these conversations you had were with persons who were contemplating making a tender offer and were discussing with you the practicalities, is that the gist of it

A They were both with people who were contemplating a tender offer and with companies that considered themselves target companies in Wisconsin and therefore were perhaps expecting or possibly expecting a takeover attempt.

Q As far as any actual contested or possible tender offer situation, I take it you had personal experience with one, the one which you described?

A That is correct.

Q How many tender offers, sir, have been made in total under the Wisconsin statute? Have you told us about all of them?

A Yes, four.

Q Do you know, sir, how many tender offers have been made with respect to target companies which are subject to other state statutes?

A Since the beginning of time?

Q Well, the time didn't begin all that far back, about 1968, as I understand it.

A No. I think tender offers as a means of acquiring corporate control started probably in the early [76] '60s with some vigor.

Q I had in mind those which had occurred with respect to target companies which were subject to state statutes.

A The first state statute was enacted in 1968.

Q That was in Virginia?

A Yes.

Q Do you have any impression as to how many tender offers, let's say, hostile or unfriendly tender offers have been made under all the state statutes; that is, with respect to target companies which are subject to those state satutes, roughly?

A I would say that it is probably—unfriendly takeover, I would say it's probably in the area of sixteen to twenty.

Q All right, sir. Do you have any impression how many tender offers have been made in Wisconsin prior to the adoption of the Wisconsin statute in '73?

A I'm not aware of any.

Q There may have been some, you don't know; is that right?

A That's correct.

Q I understood you to say, Mr. Bartell, that while the state statutes in your opinion had had a chilling [77] effect on tender offers in the past, that the situation now was improved, that he chill was off and I think you said that offerors had learned to deal with the tender offers, the state statutes. Is that, sir, what you said?

A No. I didn't say that but I would personally tend to agree with that statement.

I think that—I think that with the experience that has been gained in the last year or so under the state statutes that there is developing a stratagem for dealing with them in the legal community that involves itself in this activity and I think that there is probably not so much what you referred to as a chill as there perhaps used to be.

Q Would it be fair to say, Mr. Bartell, that under the state takeover statutes—I've been calling them tender offer statutes, takeover statutes, are they roughly interchangeable?

A Some statutes refer to it as tender offer statutes, some states refer to it as takeover act.

Q Let's call them for the moment takeover statutes. Would it be fair to say that whatever the situation may have been in the early '70s that as of the present time these state statutes collectively, in your opinion, are not a significant deterring effect as far as tender offers?

[78] A No. I would say that there is still a significant deterrent fact of the state takeover statutes I think that effect has been lessened by proliferation of those statutes because there are a great many more states now which allow comparable positions so that when an offeror is shopping around for a prospective target company it would be much harder to find a prospective target that is not covered by one of the state takeover laws. I think that the deterrent effect has lessened but it's still significant.

Q Are you saying that as more states come to have these statutes the would be offerors are resigning themselves to the existence of the statutes and deciding they have to live with them and proceeding to make their offers despite the statutes?

A Exactly.

Q On this question of multiplicity, I believe you told Mr. Conant that there was a problem, as you saw it, at least potentially, in the sense that the state statutes are drafted in such a way that quite possibly a particular tender offer could be subject to more than one, indeed in some cases, several state statutes; is that correct?

A Yes.

Q Do you know, Mr. Bartell, or are you aware [79] that in the present case New York has expressly stated that they could not assert jurisdiction over this proposed tender offer and that there is only one state, namely Idaho, that is asserting jurisdiction?

A I learned that during the recess.

Q The multiplicity situation which you have said is a problem or a potential problem, are you aware of any actual examples, sir, where more than one state has actually asserted jurisdiction over a proposed tender offer?

A Well, I think that depends on what we mean by asserting jurisdiction. I am not aware of any contested takeover in which more than one state has held a hearing. I am aware of a number of cases in which a state statute has been interpreted to apply to the transaction but the administrative proceedings of that state were deferred.

Q Interpreted by whom?

A By the state administrator.

Q Thus he asserted jurisdiction?

A He was able to find that the transaction could be covered by the state law but deferred proceedings in favor of another state that had perhaps a greater interest in the transaction.

Q Similar to what New York perhaps did in the present case or do you know the facts on that?

[80] A I just saw a letter during the recess that describes what New York did. That's all I know about it.

Q I take it then, sir, that you were not aware of any situation where in fact a tender offeror has had to comply with more than one state takeover statute; is that correct?

A To the extent that you mean had to participate in a hearing, I think that's right.

Q How frequent is this hearing process you described? You've had one, I believe you said one in Wisconsin?

What was the result of that one, was the takeover successful?

A Yes.

THE COURT: EZ Painter case?

THE WITNESS: EZ Painter case, yes.

Q (By Mr. McKay) In the EZ Painter case, the one hostile takeover situation in Wisconsin which actually went through your office, as I understand it, was there a problem there of multiplicity or state statutes being applicable?

A No one involved in the case nor any other state raised a question concerning jurisdiction in another state.

Q You mentioned that there were three other [81] tender offer situations which were not really hostile. Was there a multiplicity problem in those cases?

A No.

Q Do you know by name or otherwise any instances in any other state where, in fact, a tender offeror was faced with a problem of dealing with the statutes of more than one state?

A Again, I just know that my knowledge is that there —to my knowledge there has not been another case in which a hearing has been held in more than one state. It is my impression, however, that offerors do have to deal with the potential of a hearing in more than one state and the potential of varying degrees of jurisdiction in more than one state.

Q Do you know any case by name or otherwise where an offeror has had to do anything short of a hearing actually filed a registration or do anything on a proposed tender offer in more than one state?

A No.

Q As state statutes go, state takeover statutes, Mr. Bartell, based on your knowledge and experience as you have described, do you regard the Wisconsin statute as a relatively good statute?

Q Good in what respect?

Q Well, what your criteria ought to be as far [82] as operating a state takeover statute. You've told us, I believe, or told Mr. Conant that there was some problems with the state takeover statutes?

A Yes.

Q Could you recap very briefly for us what the problems are in the state statute that you see?

A Problems have to do with the definition of the target company, what you would refer to as the multiplicity of the jurisdictional nexis; the specificity of the terms that are used to define that target company; the mandatory hearing requirement; the proceedings including the time limitations that are used, provided in the statute; the substantive

rights that are provided to tendering shareholders, that is, for the proration, withdrawal rates, so forth.

Based on those problem areas I would say that the Wisconsin law is not at all free of those problems and is not the works of the state statutes, somewhere in the middle.

If I were to be in a position to amend that statute I would have certain things that I would like to do to it.

Q Have you made recommendations or made efforts toward amendment of the Wisconsin statute?

A I have not, I am awaiting the work of these [83] committees that I've already testified to.

Q As compared to the Wisconsin statute I take it you have some knowledge about the Idaho statute?

A Yes, I do.

Q Would you regard it as better or worse or about the same, as the eye doctor would say?

A It's almost exactly the same.

It—the major difference the statutes that I saw was that it does not require the administrator to make a fairness finding and I'm not sure whether that's good or bad.

In a cash tender offer situation where cash is a consideration, I have indicated in my EZ Painter decision that I'm going to let the marketplace determine the fairness of that kind of an offer. So, there is really very little difference.

Q You mentioned some problems, sir, about the state statutes. Would you agree that there are also some pluses that the state statutes, in fact, do do some good?

A Oh, yes.

Q What would you mention as the plus areas as far as what the state statutes contribute to the situation?

A Well, there's no question, that the applica- [84] tion of the states statutes has had the effect in the cases where they have come into play, have the effect of extending the term of the offer during which period the price that has been paid for the shares has almost always gone up so that the shareholders received a greater consideration for their shares in connection with takeovers that ultimately were consummated.

Q Is that desirable in your judgment?

A Yes. In general terms I think that shareholders should get a reasonable price for their shares and I think that there are limits to it. I don't think that shareholders are entitled to a fair price plus a premium of some kind because it is a voluntary transaction but I think in general terms I think shareholders should get a higher price.

THE COURT: How does this high price come about? Is there more than one way that it comes, either the offeror increases his offer or the target company manages to obtain another offer?

THE WITNESS: These are the two principal ways in which the shareholder—

Q (By Mr. McKay) I can't hear you.

A These are the two ways in which the shareholders normally have received a higher price.

Q Those ways again are what?

[85] A The first way is where the offeror in order to—for further inducement for tendering and perhaps to obtain the concurrence of the target board has raised the price during the proceedings.

Secondly, where a—what has been referred to as a "white knight", or another offeror comes along and chooses to make an auction out of it, to bid the price up during the term of the offer.

[86] Q. You mentioned incidentally that you felt it was desirable that the shareholders get what, the best possible price?

A. Best price that the market will provide.

Q. You said that they ought not, however, get a premium price or a price more than the stock is worth. Have you ever heard of a situation where under a tender offer, hostile situation, shareholders got more than they should have?

A. I'm not personally aware of it.

Q. Well, it's tough to conceive of one, isn't it?

THE COURT: Doesn't the tender offer procedure and the written notice and everything else, given enough time, result in ultimately the shareholders getting the maximum value, that somebody who knows the value is willing to pay for it?

THE WITNESS: I use that premium term in the context juxtaposed with an involuntary situation. A going private situation where the shareholders are required to give up their equity ownership in the company, and it's my view that they should get not only a fair market price for their shares but they [87] should get a premium on the basis that they are being required to relinquish their shares at a time they may not want to relinquish their shares.

THE COURT: An involuntary divestment would in your opinion call for a permium?

THE WITNESS: That is correct.

Q. Mr. Bartell, would you agree that the longer the shareholder and the target company can have to increase its kitty, as it were, in the respect you mentioned, the greater the likelihood that the shareholder will get the maximum value for his shares?

A. I think that's true to a point. I think there is probably a time after which diminished returns—

Q. That's after some time, you're talking about?

A. It would be after some period of time.

Q. Like some weeks at least?

A. Yes.

Q. Maybe months, perhaps?

A. Perhaps.

Q. All right. Incidentally, I gather that when you say this is an advantage of the state statutes, namely that the shareholders get these benefits as described, I take it that your feeling is [88] that under the Williams Act and in the absence of state statutes, they don't get that benefit, is that right?

A. That is correct.

Q. Would you agree, sir, that this benefit which the state statutes afford as you've described, reflects a shortcoming or an inadequacy in the Williams Act insofar as looking out for shareholders?

A. I agree with that statement. I think the Williams Act is inadequate in regard to a period of time that is given to—to the shareholders to determine whether or not they will tender.

Q. Mr. Bartell, I interrupted you after you had mentioned one of the advantages of state statutes. Are there additional advantages?

A. Yes. I guess I would cite the advantage of—that the state statute was intended to provide, and that is a review by the state administrator of the disclosures and in some states the fairness of the tender offer. In conection with that review I think that the state regulator provides a forum that cannot be—that is a very important forum to have these issues resolved. The Securities Exchange Commission in connection with its administration of the Williams Act does not provide a comparable forum [89] for those kinds of reviews.

And secondly, I think a—more of a practical and unintended benefit of the state law is that it—that they have the effect of, by virtue of their deterrent, a detterence effect, having the effect of preserving the character of local industry, local companies and maintaining the employment base of the state and economic and social benefits that are not written into the state takeover laws.

• • •

[91] • • •

Q (By Mr. McKay) Mr. Bartell, with respect to the problem we discussed a little bit this morning on the question of several states simultaneously, potentially asserting jurisdiction over a tender offer, is it true, sir, that the state securities commissioners get together from time to time and various organization which you participate in and talk about certain things?

A The subject in general?

Q Yes.

A Yes.

Q Is that activity of those state securities commissioners collectively a useful thing, do you think, in minimizing that problem that might otherwise exist in this multiplicity business?

A Yes, I think so.

Q Has it, in your experience, resulted perhaps in some situations where one state might be inclined [92] to sort of yield to another state which appears to have a greater basis for jurisdiction over a tender offer?

A Yes, I think that that could happen. In some instances I think that there is a question as to whether a state administrator under his or her statute actually can defer to another state.

I think under the Wisconsin statute I would have the authority to do that, to, in effect, exempt the transaction from the takeover law where the application of the Wisconsin law would not be necessary for the protection of the investors.

Q And in a situation where your decision on that is perhaps influenced a bit by your knowledge that some other state was going to take jurisdiction?

A Yes.

Q As I believe you've testified this morning on direct exam there are a number of states that have these state statutes that we're talking about here.

Are you aware that there are presently about twenty-eight states which have provisions with respect to regulation of takeovers?

A That is my count now.

Q Are you aware that Texas is now in that group?

A Yes.

[93] Q And that was as of when, sir?

A May 6, I believe, their emergency went into effect.

Q By what route did Texas get in that group? Is that a result of some big, bad vested interest types lobbying in the Legislature or is that by some other route?

A I don't know if ther are big, bad vested interests involved. All I know is that the provisions are in the form of emergency rules adopted, I think purportedly—at least partly under the anti fraud provisions of blue sky.

Q Am I correct, sir, that the rule which now exists in Texas was put in by a Securities Commission itself, not by the Legislature?

A That is correct.

Q Does that now have the force of law in Texas as far as what has to be done on a takeover there?

A As I understand—

MR. CONANT: Your Honor, I believe I would object to that. That clearly calls for a question of American-Texas law, this witness's opinion on whether that was now the law in Texas.

THE COURT: I'm going to overrule it, goes more to the weight than the admissibility.

A (By the Witness) It is my understanding that [94] administrative rules have the force and effect of law.

Q (By Mr. McKay) So, if a proposed offeror now wanted to make a tender offer with respect to a Texas company with substantial Texas interests, whatever the criteria happened to be, he would have to deal with the

Texas rule just the same as he would if it were a Wisconsin or Idaho situation; is that right?

A I believe that to be true.

Q Do you, Mr. Bartell, see any significance in the fact that not a handful but twenty-eight of the fifty states, most recently Texas, have now got to the point where they have these state stakeover statutes?

A Do I see significance in that?

Q Yes. If I may suggest, sir, do you think that maybe there's some relevance in appraising the desirability and appropriateness of these statutes? I'm not talking about the narrow question of constitutional law, but the desirability that twenty-seven state legislatures plus the Securities Commission of Texas acting on its own have seen fit to do something about the situation?

A I think that that's significant. I'm not sure exactly what response you're seeking, Mr. McKay.

Q Would you believe, sir, based on your own knowledge and experience which you described that it would appear from this activity that a number of states have seen [95] a need for improvement of the situation that existed under the Williams Act in the directions that you were talking about this morning such as need for greater protection of shareholders in the discovery area, more time to get a better price and that sort of thing, would you agree with that?

A Yes, indeed.

Q You mentioned, sir, the committee which I believe you called the Loss Committee which was working on the proposed Federal Security Code—are we on the same wave length on this Loss Committee thing?

A I think so.

Q Did you testify this morning, sir, that it was recommending pre-emption in a proposed new Federal Code provision for pre-emption?

A Yeah. The Code as presently drafted involves a section that invokes the supremacy clause to a limited extent to pre-empt in the states in certain areas. Among those area is the regulation of takeover offers.

Q This is a proposed Federal statute which would provide that the SEC has total jurisdiction?

A Jursdiction would exclusive in the area covered by the Code section dealing with corporate takeover.

Q Did you work with the other members of this [96] group in discussing that situation, sir?

A No. As I mentioned, that provision was drafted before I became a member.

Q There's been no discussion of it since?

A Not among the advisory committee. There have been discussions individually, me with Professor Loss, on the entire section 1603 of the proposed Federal Securities Code.

Q Are members of this advisory committee reasonably bright, intelligent, well informed people in the securities area, would you say?

A I would say they are the brighter and most informed of them, the people in the securities area.

Q Would it be your impression, sir, as one who has worked with these people and is aware of what they are doing or trying to accomplish in this proposed legislature or this proposed—before legislature, that when they recommend that there be a statutory, Federal statutory

change to provide for Federal pre-emption that in their view pre-emption does not presently exist and therefore that statute is needed?

MR. CONANT: We'll object to that, calls for this witness to speculate on what others to whom he has testified he has not talked or participated in their discussions might have [97] thought when they wrote a specific pre-emption statute.

THE COURT: I'll overrule. Go ahead.

THE WITNESS: Your Honor, I'm afraid I'm not going to be able to testify except to say that I'm not aware of what their state of mind or intentions or beliefs were with respect to the subject of pre-emption was or was not apart from this new section under the Federal Security Code.

Q (By Mr. McKay) Do you share the view which was formulated before you joined this group that there ought to be an amendment to the Federal law or a provision in this new proposed code which does provide for pre-emption is that true of you?

A My view would be based on—my position on that issue would be based upon what the Federal Securities Code would provide with respect to Federal regulations or tender offers.

At the present time my view would be that it—the state should not be pre-empted based upon the manner in which the Code is presently drafted with respect to takeover offers. However, that provision dealing with the Williams Act is to be reviewed by the advisors and by the reporter and depending on the results of that review I [98] might change my mind.

At the present time I do not agree with the position of the Federal Securities Code proposing that the state be totally pre-empted.

Q I take it, sir, that your feeling then is that if the Federal law were to say the right things then pre-emption would be desirable and short of that it's not desirable; is that right?

A As a broad statement I would agree with that.

Q Now, I want to find out what things you think are needed to be provided in the applicable law, whether it be state or Federal, before you would vote for Federal pre-emption. What's needed to cause you to become a believer in Federal pre-emption?

A Well, I don't think I'd characterize myself as a believer in Federal pre-emption.

Q I'm sorry, but you said, I believe, that you felt pre-emption might be a good thing with the right provisions.

A Might be appropriate if the Federal law were adequate.

Q Would the things which you would like to see in a Federal statute before you favor pre-emption, you told us, I think, there are some things in the state statute [99] which are needed at least until a Federal law covers those things, would those things include such things as greater protection than the Williams Act now affords in terms of more time to make a decision?

A Yes.

Q More time to get all the facts including giving management an opportunity to comment?

A To respond, yes, sir.

Q Anything else that you would like to see in a new Federal act which operates in a pre-emption situation?

A I would like to see the Federal law provide for, among other things, for the offeror to be able to obtain a list of the shareholders of the target company which is presently provided under state law but not under Federal law.

Q Anything else?

A I would like to see the proration—the period for proration extended somewhat and the period for withdrawal, shareholders tendered shares extended somewhat.

I would like to see a period of perhaps confidential review by the SEC prior to the tender offer being made.

Those are some factors that I'd like to see.

[100] Mr. Bartell, I take it that all of those factors you mentioned are things which don't presently exist under the Williams Act; is that correct?

A That's correct.

[101] Q. In your article which you discussed with Mr. Conant or which he identified this morning, I note that you state at the bottom of page one that the history of the Williams Act, and I'm quoting for a moment here, suggests that the primary focus of legislative interest was on the public shareholder. Congress wanted to insure that a shareholder had the benefit of the full statement from the offeror. That the chance for incumbent management to give its side of the story, if it was so disclosed.

That is your understanding of what the Williams Act was seeking to deal with, is that right?

A. That is my understanding, yes.

Q. And to the same effect on the third page you state, it is shareholders who are the proper beneficiaries of the law's protection.

Do I correctly understand then, sir, that the Williams Act as you understand it was aimed primarily at protecting shareholders?

A. That is correct.

Q. And what was it, as you understand it, sir, that had existed prior to mid-1968 which required shareholders to be protected from?

A. Well, as I understand the situation in the sixties, there was a climate involving acquisition of [102] of corporations that prevailed that during which the offerors would make what were referred to in the Williams Act hearings as raids on what was called proud old companies. And they would pirate away, again quoting, their best assets. This was all done in a big hurry without an opportunity for shareholders to consider the offer adequately and without an opportunity for the target's management to respond in any meaningful way.

There was also a problem to the effect that the traditional antifraud provisions of the federal securities law did not apply to these transactions in most respects because 10(b) 5 had to do only with purchases and sales and did not protect nontendering shareholders or tendering shareholders whose shares were not picked up. For all of these reasons, as I understand it, Senator Williams and the others who molded this legislation felt it was important to equalize the balance between offeror and target company by providing a regulatory scheme pursuant to which the shareholders would ultimately benefit. And providing some anti-

fraud provisions that would regulate the transaction and require disclosure of all material facts and prohibit omissions of material facts.

[103] And this is the, as I understand the history that led to the Williams Act and it is the same kind of—these are the same factors that led to the development of the state laws, also.

Q. Are you aware, sir,—you've told us about the rights which it was intended to give shareholders under the Williams Act. Are you aware of any rights which the Williams Act was intended to give to the offerors?

A. I don't know of any rights that were explicitly designed for offerors.

Q. Or even implicitly?

A. Well, implicitly, the offeror has a right to rely on the procedures that the Williams Act Provide and—

Q. Which procedures required offerors to go through some rigamarole they hadn't previously been required to do, is that not right?

A. Yes. They had to go through the procedures.

They also can rely on the fact that given that the Williams Act prohibits misstatements in their solicitation materials it also prohibits misstatements in the target's materials as well.

Q. So an offeror under the Williams Act might be said to have been given a right under the Williams [104] Act to be free from or to not be suffering from fraudulent misstatements by the target company, is that it?

A. Yes.

Q. Any other rights which either expressly or implicitly were given to offerors by the Williams Act?

A. I can't think of any offhand.

Q. All right, sir. Now you've already told us I believe, that the Williams Act in your judgment did not go far enough as far as protecting shareholders and that some additional protection is needed by further legislation, whether state or federal, is that right?

A. Yes.

MR. McKAY: Your Honor, we have no further questions and we also have no objection to the article which was identified assuming as we do, that it is being offered to state the witness's views on the subjects there discussed.

THE COURT: M-6? It's admitted.

MR. CONANT: M-6, Your Honor.

THE COURT: Anything else?

MS. JUVILER: I have no questions.

THE COURT: Thank you, ma'am.

[105] MS. JUVILER: And I do not object to M-6.

THE COURT: Anything else?

MR. CONANT: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. CONANT:

Q. Mr. Bartell, you remarked several times in cross examination that you were aware of instances in which two or more states had determined that they had jurisdiction over a tender offer but that one had deferred to another, do you recall that testimony?

A. Yes.

Q. And you also testified I believe that you—you believe that under your Act, the Wisconsin Takeover Act, you yourself would have the power that if that came up, to so defer to another state?

A. I believe that that's the fact.

Q. Am I correct in saying that there is nothing however in your Act, Wisconsin Act, that would require your deference to another state?

A. I believe that's correct.

Q. Are you aware of any state takeover act which contains any provisions that would require its commissioners to defer to another state which also had jurisdiction?

[106] A. No, I'm not.

Q. So under the best of circumstances this deference procedure becomes a matter of the administrator's discretion, is that correct?

A. Yes.

Q. And am I also correct that you expressed an opinion that under some Acts there might even be a question as to whether an administrator could defer in the event of jurisdictional conflict?

A. Well, I think that there would have to be explicit statutory authority for the commissioner to defer if the statute requires the commissioner to act in the case of an application or registration. And I believe that there are—I have not done exhaustive review of the state laws in this regard, but I believe there are some states where—where that explicit authority does not exist.

Q. You told Mr. McKay that you saw some pluses in the State Takeover Act and I think basically you listed three. That frequently as a result of the delay the offeror raised the price to the shareholders. That they provided a chance for the administrator to review the disclosures and fairness of the offer. And the third one was that they preserved the character of local companies and local em-

ployment and the like. [107] Is that a fair resume of the pluses as you saw them?

A. Yes.

Q. Let me talk to you a moment about the first of those, that the offers frequently go up or the amount of money acquired by the shareholders goes up as a result of the delay. Is there any—is there any necessary connection that you can point to between the delay created by the State Takeover Acts and the rise in the price to the shareholders?

MR. McKAY: Excuse me, Your Honor. I will object for the record because I don't think that relates to anything that I dealt with on cross examination and I suppose that Mr. Conant is limited to that area.

THE COURT: I'm going to overrule the objection, Mr. McKay. Do you remember the question as put?

THE WITNESS: Yes.

THE COURT: Go ahead and answer.

A. I don't think there is any necessary connection in delaying of the increase in price.

Q. Are you aware of instances in which there was a takeover to which no State Takeover Act applied but during the pendency of the offer, the offeror raised the price?

[108] A. Yes.

Q. Have there been any discussions in your associations or your committees of the fact or at least the possibility that the State Takeover Acts themselves because of a lower opening price to be made, lower opening offer to be made for the target company's share than would otherwise be the case?

A. Yes. We have—we have discussed that possibility. I don't know of any particular instances in which that has occurred but it is, I think, in line with what I said before about developing a strategent for dealing with state takeover laws. That one of those strategies could very well be that the opening bid in a takeover attempt would be lower than it would otherwise be in the anticipation that the ante will have to go up during the pendency of the state proceedings in order to—in order to achieve a successful result.

Q. So when you said in response to one of Mr. McKay's questions that the legal profession seemed to be working out ways of dealing with the State Takeover Acts, that was one of the ways of dealing with the State Takeover Act you had mentioned?

A. Yes, that would be part of the strategy.

Q. Well, if that were the situation then, if [109] that in fact were the stratagem and becoming a common stratagem, then to a larger extent, any increase in price insofar as it could be attributed to the State Takeover Act?

A. That would be true. Hypothetically, that would be true. As I said, I don't know of any particular instances in which that has occurred.

Q. In any of these instances which you are aware when the price went up, do you know whether outside or other compensations to incumbent management likewise went up?

A. I don't know of any particular cases in which that happened. As a securities regulator I would certainly be concerned if management were able to obtain, in connection with this transaction, special benefits that the shareholders were not able to obtain.

Q. You are aware, as an administrator, are you not, that that's not infrequently the case in negotiations between the target and the offeror, that the incumbent management wants job security or some other emoluments in order to buy their recommendation of the offer?

A. Yes, I'm aware of that. The state statute does prohibit the offer being made to management [110] shareholders on different terms from those that are offered to nonaffiiliated shareholders. But I'm aware that long-term employment contracts, various other special considerations are sometimes offered to management.

Q. Are there some State Takeover Statutes that do not require disclosure of these—any additional emoluments paid to the managers or the shareholders who are also management?

A. I don't think so. I think that that kind of information would be required under every state law that I'm aware of.

Q. It is a common characteristic of Takeover Acts, is it not, that if management recommends the exception by shareholders' tender offer that the state administrative agency never even takes jurisdiction or never even can take jurisdiction to look further into the offer, isn't that correct?

A. That is correct. It's common that such situations are excluded from the definition of takeover.

Q. That provision also gives rise to another question. These Acts are not infrequently justified on the basis of protection of local shareholders. In the case of your State Takeover Act in Wisconsin, is there any—any provision in determining whether [111] or not you have jurisdiction

over a particular tender offer which is tied to the question of whether there are any shareholders of the target company resident in Wisconsin?

A. There are none, that is true. As I understand it, of nearly every state takeover law, that there is no requirement for jurisdiction that any shareholders reside in the state asserting jurisdiction under the takeover law.

Q. So conceivably you as a state administrator could be put in the position of passing upon a tender offer when there would be no shareholders in the State of Wisconsin who would be affected by that?

A. That is conceivable.

Q. Do you understand that the Texas—these Texas rules, under whatever authority they were promulgated, do in fact contain a shareholder jurisdiction trigger?

A. As an alternative, as I've reviewed the rules, they provide a jurisdictional trigger if a majority of the shareholders or a majority of the shares are located in Texas. There are also some other jurisdictional triggers.

Q. Is that provision in your experience a unique one among state takeover regulations?

[112] A. Absolutely unique.

Q. The second plus that you saw was that the State Takeover Act provided for a preliminary review of the sufficiency of the offeror's disclosure and the basic fairness of the transaction. In your State Takeover Act in Wisconsin, are you given much in the way of guidance as to what are sufficient disclosures about each of the matters that are listed in your statute?

A. We have the statutory provisions which set forth the required disclosure. We have some administrative rules

that elaborate somewhat on those statutory provisions. Beyond that, we have to consider that each transaction, the facts and circumstances in order to determine what disclosures are appropriate in the entries for the protection of investors.

Q. So your view of what would be a sufficient disclosure in a particular tender offer might very well differ from say the view of an Idaho securities administrator operating under essentially the same Act?

A. Yes, that is true.

Q. Also did I understand you to say that at least in your view the question of fairness was one [113] that should be worked out in the market place?

A. I said that with respect to a cash tender offer. With respect to cash I think that the market place forces have a greater impact. If the offer involves an exchange of securities I think a fairness determination would be much more important.

Q. Likewise if it involved an exchange of securities we would be dealing with a different set of federal rules and federal statutes, would we not, federal laws?

A. That is correct.

Q. So for purposes of this hearing let's assume when we talk of tender offers, that both you and I are discussing cash tender offers.

A. That's fine with me.

Q. Would you explain to me a little bit, if you would; the fairness should be worked out in the market place. What do you mean by that?

A. What I mean is that where an offeror is—has indicated to shareholders that it's willing to pay such and

such a price for the shares, net, that— and the shareholders have complete information regarding the offer and know what the market price of the securities or recent trades have been, that it's perfectly within the investor's ability to be able to [114] judge the adequacy and fairness of that price and determine whether they want to tender at twenty-one or whether they think that price is too low and they should hold out and see if the offer should be made at twenty-three, or if the market price will go up to twenty-three during the pendency of it.

Q. In order for the market place to actually make that determination then, the offer must in fact be made and be outstanding so that the purchases and sales can take place and we can determine what the market place is doing, is that right?

A. Yes.

Q. You discussed with Mr. McKay, again in the idea of time, you said in your estimation at least some delay was a good thing but how much was an altogether different question. There was, I think you used the term diminishing return at some point in time. Is that a fair summary of your position?

A. Yes.

[115] Q. Are you aware, Mr. Bartell, that Congress did when it passed the Williams Act give some fairly extensive consideration to the time factors?

A. Yes.

Q. And are you aware from your review of the history of that Act, such other sources you deem necessary, that Congress—that it was proposed to Congress by various people that there be preclearance requirements of various lengths?

A. Yes.

Q. And each of those requirements were, at least insofar as they dealt with preclearance requirements were rejected by the Congress in passage of the Williams Act?

A. Yes.

Q. So then what you are telling us here, though, at least in your opinion, you disagree with the way in which Congress put together the regulatory scheme that came to be known as the Williams Act?

A. In some respects, right.

• • •

Transcript of trial proceedings:

Testimony of G. Michael Boswell, adverse witness

on behalf of Defendant Idaho officials

Direct examination

Cross examination at 201

[151] • • •

Q. When you received Mr. Baptie's letter, did you regard that as a departure from what Mr. Metzger had told you Mr. Baptie was going to require?

A. Yes, sir.

Q. And why, what respect did you regard it as a departure?

A. Because the letter, as I recall, called for quite a bit of disclosure that in my opinion was irrelevant as it related to a cash tender offer and quite a bit of requests that were for subjective materials and for request of items that were more [152] properly in my mind includable in a registration statement that would be utilized for the sale of a security rather than what I had understood to be a filing predicated upon the disclosure requirement by a 13(d).

Q. And your complaint therefore was that he was asking for more than a 13(d) did and you had been led to believe that he would not ask more or at least not very much more, is that what you've told us?

A. I believe the complaint stated that the letter was unreasonable, unnecessary and other things and that was my opinion concerning the letter at the time we received it.

Q. But was it unreasonable in your mind and you have said this, essentially because he was asking something more than a 13(d) did?

A. No, sir. It was in fact more than a 13(d), but had I known in advance what he was going to ask for in his attempt to enforce his statute, I don't believe that we would have filed in the first place.

Q. I gather then what you're saying, Mr. Boswell is that if it hadn't been for what Mr. Metzger told you he had been told by Mr. Baptie, then you would have not filed in Idaho, is that the point?

A. No, I don't think that's a very good rendition [153] sir. Idaho had never had a filing under its statute.

Q. Yes, sir.

A. Idaho was frank, as I understand it, in expressing to us its concern over its lack of staff and its lack of guidance. If we had known in advance as to what Idaho was going to ask for with regard to complying to this statute, I don't believe that we would have filed. But I don't think that that decision hung on what Mr. Baptie told Mr. Metzger.

Q. All right. What would you have done if you had known in advance you were going to get a letter like Mr. Baptie's letter?

A. Probably filed this lawsuit sooner than we filed it.

Q. All right. In other words, at the time you filed in Idaho you had already considered the constitutionality of the statute and had already completed a possibility of filing a lawsuit charging it?

A. I don't think that I could say we contemplated it. We had discussed the difficulties involved in complying with Maryland, New York and Idaho and it was our belief at that time that we would have to file in all three places and we had lengthy discussions with counsel concerning the problems created by the Idaho disclosure and publication notice in light of the [154] fact that New York had a statute which prohibited publication. We had gone into it extensively whether or not the local papers in Boise had any residents of New York which received this paper and we found that it did. And we were very concerned as to whether or not compliance with one statute would lead to violation of another statute, what the time requirements would be and whether or not we had alternatives available to us other than compliance.

• • •

[163] • • •

Q You state, sir, in paragraph 23 of the complaint that the Idaho order requires Great Western as a prerequisite to making a tender offer to alter the terms of that offer. I'll stop there.

In what respect, sir, did the Idaho order require Great Western to alter the terms of the offer?

A As I recall, sir, the $200,000 support for reimbursement of the shareholder committee efforts had been mentioned by Idaho and they had asked for—to be included in the solicited materials, materials of a highly subjective nature with regard to projections, almost, which we felt

that we could not properly comply without running afoul with the provisions of the Williams Act.

Q Anything else that you regarded as a change required in your offer?

A Not that I recall, sir.

[164] Q Can you elaborate for us, please, this problem about possible conflict with the Williams Act or running afoul with the Williams Act?

A I'll have to refer to the letter itself, sir.

Q Fine, sir.

A (Witness refers to document.) All right, sir. On page 3, the third paragraph from the bottom states as follows, the first sentence of the second paragraph on page 41 states:

"The purchaser has filed with the Commission preliminary proxy material relating to the proposed plan of recapitalization. We ask that a more definitive description of the proposed plan be disclosed indicating any possible effect such plan might have with regard to the Sunshine Company."

We were advised by counsel that inasmuch as we have filed this proposed plan of reorganization and recapitalization under the proxy rules and inasmuch as the proxy rules were treated as confidential and inasmuch as we were unwilling to disclose the items under that plan until such time as we had received comments back from the Commission that a further explanation of that plan in the tender offer could be considered to be gun jumping under the Securities Act and could in and of itself violate the [165] Williams Act.

Q All right, sir. Was that problem that you just described which the counsel and you concluded Great Western had ever discussed with Mr. Baptie or anyone in Idaho?

A I presume that Mr. Metzger discussed that problem and other problems raised by this letter with Mr. Baptie.

Q Why do you presume that, sir?

A Because that's his job.

Q Did you and he talk either before or after his contact with Mr. Baptie about whether he was going to discuss that or such things?

[166] A As I recall, sir, Mr. Metzger contacted Mr. Baptie at the receipt of this letter and had a conversation with him concerning the contents of the letter, and Mr. Metzger reported to me following that conversation that he felt that the atmosphere and the attitude of the Idaho Commissioner was entirely different than it had been in the preceding week, that it was a somewhat hostile atmosphere and that he was uncertain, he, Mr. Metzger, as to whether or not we would ever adequately ever be able to satisfy the requests or the demands of the Idaho Commissioner.

Q Yes, sir. You told us that and in almost precisely those words but my question was whether you know whether Mr. Metzger talked with Mr. Baptie about this precise problem which is, I can see, is a substantial problem for Great Western as you described it once the facts are all known. Do you know whether Mr. Metzger discussed that with Mr. Baptie?

A No, sir, I can only assume that he did. I do not know.

• • •

[178] • • •

Q. (By Mr. McKay) Page nine of the complaint, Mr. Boswell, Paragraph 26, you state in the sixth line [179] that Great Western would be deprived of its rights under the Williams Act to make its tender offer at a premium

above the market. I realize that in a sense we're talking lawyer and one question which is probably a legal question in this case, although I'm not sure, it may be a factual question as to whether the Williams Act granted the offerors a right, but you're a lawyer, and, therefore, I will ask you, is it your position, sir, that Great Western as an offeror was given a right under the Williams Act to do what you say here?

A. I guess—

MR. IRWIN: Your Honor, I'm going to object to the question.

THE WITNESS: I'm not clear on the question.

MR. IRWIN: You asked him to respond as an attorney representing Great Western and interpreting the rights?

THE COURT: Let's do this. Give him a right or give Great Western a right to do what specifically, to do what, the Williams Act?

Q. (By Mr. McKay) I'm quoting now the complaint, sir, a right—Great Western will be deprived of its right under the Williams Act to make its proposed cash [180] tender offer at a premium above the market price to shareholders of Sunshine throughout the country. Now, my question is whether in this witness's view the Williams Act gave a right to a tender offeror to make a tender offer of any kind, the Williams Act gave a right; is that your position, sir, as the executive vice president, Plaintiff and a lawyer?

A. My position?

Q. And just answer yes or no or I don't know. I won't pursue it.

THE COURT: I will let you answer it.

THE WITNESS: Yes.

Q. (By Mr. McKay) All right.

A. Okay.

Q. Fine. Paragraph 27, you say that the existence, the very existence of the State Takeover Acts, and I am not clear whether you're talking about three of them or twenty-eight of them, but in any event, the existence of the State Takeover Acts and the Idaho order has had, and unless enjoined, will continue to have a chilling effect upon the exercise of rights of prospective tender offerors throughout the country. You allege that as a fact under oath?

A. Yes, sir.

Q. Are you an expert on this subject, sir?

[181] A. Yeah, I think I probably am.

Q. Good. Well, we got an expert here. Did you make a study of the chilling effect or any other effects which the State Takeover Acts have had on tender offers throughout the country?

A. As an investment banker, as a lawyer and as a businessman, I have been involved in several tender offers, and I know that since the passage of the Takeover Statutes, there has been an effect which is to discourage tender offers.

Q. You know that how, through the effect it's had on you as a potential offeror or the effects had on people who were potential offerors who said it had a chilling effect on me or from what?

A. From reading trade publications such as a periodical called *Merger and Tender Offers,* from attending various legal security law seminars, and from general discussion with investment bankers.

• • •

In the United States District Court
for the Northern District of Texas

Dallas Division

Civil Action No. CA 3-77-0405

[Title Omitted in Printing]

BE IT REMEMBERED that commencing on May 24th, 1977, the following proceedings were had in the above entitled and numbered cause, before Honorable ROBERT M. HILL, United States District Judge in and for the Northern District of Texas, at Dallas, Texas.

[183] APPEARANCES:

HON. A. B. CONANT, JR. and
HON. IVAN IRWIN, JR.
APPEARING FOR THE PLAINTIFF

HON. JAMES KAUFMAN and
HON. ELLIS McKAY and
HON. WILLIAM H. STEINBRINK
APPEARING FOR THE DEFENDANT,
STATE OF IDAHO

HON. AMY JUVILER and
HON. EUGENE D. BERMAN and
HON. WILLIAM S. DUGAN
APPEARING FOR THE DEFENDANT,
STATE OF NEW YORK

HON. MARK MARTIN and
HON. FRED FOWLER
APPEARING FOR THE DEFENDANT,
SUNSHINE MINING CORPORATION

[184] PROCEEDINGS

MAY 24, 1977
9:39 A.M.

• • •

[201] • • •

CROSS EXAMINATION

BY MR. IRWIN:

Q. I am going to move this as quickly as I can. In your testimony on cross yesterday, I think you identified Mr. Baptie as the Securities Commissioner. I think his actual title is Deputy Administrator, Securities, as shown on the letter attached to the Complaint. Is that correct?

THE COURT: It will speak for itself.

THE WITNESS: Yes, sir.

THE COURT: I think that's correct.

THE WITNESS: Yes, sir, that's correct.

Q. (By Mr. Irwin) Now, did Great Western's representatives receive along with that letter the order of the same date from Mr. McEldowney which reported summarily to restrain the proposed tender offer of Great Western?

A. Yes, sir.

Q. Have there been any hearing prior to the [202] issuance of that order from Mr. McEldowney?

A. No, sir.

Q. Have you any notice prior to the receipt of that order that the tender offer was going to be restrained by Idaho?

A. No, sir.

Q. Very quickly, going back to the problems that you have enumerated in some respects as contained in that letter, you testified yesterday that there were projections which you believed you could not properly make in Idaho without risking a violation of the Williams Act and one of the projections that you focused upon was the preliminary proxy material and your reference to the gun jumping rules under the '33 Act?

A. Yes, sir.

Q. Are there also provisions in that letter which created problems with respect to any proposed merger plans of Great Western?

A. Yes, sir.

Q. Now, why would the requirement of disclosure of proposed merger plans and the effect of those plans upon Sunshine Mining Company and its shareholders as requested by the Idaho Administrators create problems under the Williams Act?

[203] A. Because those plans were very preliminary, premature, and we had actually no firm intention one way or another as to what form an ultimate merger might take, as such, we could not put together projections or financial statements showing the combined companies, and if we had done so, we would be faced with the same sort of problem that we were with regard to the proposed recapitalization and reorganization plan.

Q. Were you with me in Boise, Idaho, on April 7 and 8 in connection with the Sunshine application for preliminary injunction against this tender offer.

A. Yes, sir.

Q. Do you recall that that very issues was one of the issues that was raised by Sunshine and was resolved in favor of Great Western by Judge Callister?

A. Yes, sir.

* * *

Transcript of trial proceedings:

Testimony of Francis Wheat, witness on behalf of Defendant Idaho officials—Direct examination

Cross examination at 272

[221] * * *

FRANCIS WHEAT,

called as a witness on behalf of the defendant, the State of Idaho, having first been duly cautioned and sworn to testify the truth, the whole truth and nothing but the truth, testified on his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. McKAY:

Q Would you state your name, sir?

A Francis Wheat.

Q Your address, Mr. Wheat?

A 515 South Flower Street, Los Angeles.

Q That's your office address?

A That is correct.

Q Home address?

A 2130 Lombardi Road, San Marino, California.

Q What is your occupation?

A Lawyer.

Q With which firm are you affiliated?

A Gibson, Dunne & Crutcher.

Q You're a partner there?

A Yes, sir.

[222] Q How long have you been with them, sir?

A Since 1958 with one period of five years during which I was in Washington.

Q You're a partner since when, sir?

A Since 1955.

Q The period of time which you were in Washington, you did what?

A I was a Commissioner of the Securities and Exchange Commission.

Q In your practice, what is your area of specialty, if you have one?

A Well, my broad area of specialty is corporation law, corporation and financial law.

Q Has that been true since the time you joined Gibson, Dunne & Crutcher?

A No.

Q What did you do initially?

A I operated in a number of different fields of law for the first three years. Since that time I have concentrated on that field that I mentioned.

Q Are you a member of any organizations or groups or committees relating to your professional activities or—

A Yes. I am currently a member of the Federal Regulation of Securities Committee of the Business Law [223] Section of the American Bar Association.

I was formerly for three years a member of counsel of that section.

I was formerly a governor at large of the National Association of Securities Dealers for three years.

Q Any others, sir?

A Well, I am currently a member of the advisory counsel of the American Law Institute Code project on Federal Securities Regulations.

In the field of Federal Securities Regulations, I don't currently remember any other committees.

Q All right, sir. Through your activity and practice and as a member of the Securities and Exchange Commission, Mr. Wheat, do you have a general familiarity with the Williams Act?

A I do.

Q With state tender offer, takeover statutes?

A A general familiarity, yes.

Q Do you have a general familiarity with the procedure which is used in cash tender offers both by offerors and target companies?

A Yes.

Q When you were on the Commission, the Securities and Exchange Commission, what years did that in- [224] clude, incidentally?

A 1964 through 1969.

• • •

[226] • • •

Q Mr. Wheat, in very fundamental terms, sir, would you tell us what are the various methods by which someone who was interested in acquiring the control of a corporation might undertake to do so?

A Well, there are a number of methods but a very short answer to your question:

One method would be the traditional merger method under state law regulated to the extent of disclosure in some cases by Federal law.

An exchange offer, so called, which involves the offer of securities of the bidding company to a shareholder of the target company.

A proxy contest to acquire control of the Board of Directors and the cash tender offer.

Q In a tender offer, in a cash tender offer, what essentially is the purpose and effect of that successful cash tender offer?

A Well, the effect is to acquire, in typical fashion, to acquire at least a majority or as it's often referred to, working control of the outstanding shares of [227] equity or common stock. The purpose of selecting a tender offer route is quite typically obtaining the advantage of surprise, avoiding the necessity of negotiating with the management of the target company at least in the early stages, an opportunity to conclude the transaction if you are successful, a greater degree of flexibility which often applies and a minimal amount of disclosure used by contrast in one or more respects with the other methods that I mentioned.

Q Is there a difference between tender offer and other methods of acquisition with respect to the situation as viewed by the shareholder where a tender offer is made as compared with other methods of acquisition? How does a shareholder see it?

[228] A. Well, if we're talking about tender offers which are in this sense primarily regulated by the Williams Act, admitting the proliferation that has been referred to as state tender offers, it is quite typical for the shareholder to receive word either through an advertisement in a financial publication or through his broker or possibly through a direct mailing of the tender offer with information about how to respond to the tender offer, information about the cash price which is offered, information about the period of time during which the offer is open to be accepted, procedures for acceptance and disclosures as to the right to withdraw, the right of proration which are contained in the Williams Act.

Contrasting that in a proxy contest there is typically a substantial mailing to the shareholders from both parties. There is typically continued mailings in an effort to retain the shareholders vote or to persuade the shareholder to change his vote during the period of the contest.

In the exchange offer there is a prospectus typically delivered which is a lengthy disclosure document. That prospectus, in a merger situation, would take the form outwardly of a proxy statement which again would be a substantial document and would [229] allow a sufficient time, prior to the shareholders meeting for the shareholder to cast his vote for or against the merger.

In the tender offer situation, of course, if the target company is resisting the tender offer the shareholder will receive at least a communication from the target company to please hold off decision until the target company can present its dues. And in a situation which involves bidding, the shareholder may receive information as to a competing bid.

Q. When there is a tender offer and it comes to the attention of a shareholder, is the shareholder under any particular pressure, immediately?

A. There is considerably more pressure on the shareholder in a cash tender offer, usually, than in these other methods of acquisition or control change. Primarily because under the Williams Act—I'm speaking now without reference to the state statutes—it is possible to confine the tender offer period to a very short period of time. In the event that it is a tender for all shares of the target company, that time could be as short as seven days. A tender offer for part of the securities, it could be as short as ten days. And the tender offer dangles in front of the shareholder, cash, usually at a premium above the [230] current market. So unlike the situation where the shareholders asked to vote on something which is going to be considered at a meeting some weeks hence or to vote upon a matter of who shall be the directors of his company at a future date, a shareholder receives this offer of cash and he is advised that there is a limited period during which he can accept. And if he wishes to take advantage of the offer he must act relatively swiftly. In addition to that pressure simply comes from the the offer of cash as contrasted to these other situations, you have the pressure which comes from the way tender offers are handled in the typical market situation. The tender offeror has typically engaged a dealer-manager, skillful investment banking firm to transmit that offer throughout the country, make sure it reaches stockholders and has agreed to pay a commission to all dealers who bring in shares. That is, who persuade their clients to tender their shares in response to the tender offer. So there is an additional and to some degree one-

sided pressure in the tender offer situation because dealers throughout the country will make a commission which can frequently be very substantial, by persuading their clients to make the tender.

It's a little more difficult for the [231] target company to counter that because I know of no instance in which the target company has agreed nor any economic method of agreeing to pay the counter solicitor sixty cents a share for all shares not tendered. Although I'm sure that if there was a way to do that, some firms would be delighted. So you have in addition, that pressure.

Finally you have your rather indirect pressure of the action of arbitragers who are in the position, because usually their membreship on exchanges and capital situations are to bid up the shares of the target company close to the tender offer price, if not in excess of it.

The pressure is somewhat exacerbated by the element of surprise which is feasible with the Williams Act because the tender, the bidder can plan his bid, engage his investment bankers, develop his strategy and determine upon his price and obtain his financing all in secret prior to making the tender offer and all of that has been developed and is in place and ready to go at the time the shareholder receives word of that offer followed by relatively limited period in which to act upon it.

Q. Mr. Wheat, is there a difference in the role, in the relationship between shareholders and company [232] management in the case of considering the tender offer as compared with considering other methods of acquisition?

A. Difference in the role?

Q. The relationship between shareholders and management of the company as consideration is given to a tender

offer on the one hand and on the other hand as consideration is given to a proposed merger or a proxy fight or otherwise.

THE COURT: You mean obligations owed by management to shareholders?

A. I don't know of any difference.

Q. Obligations but also extent to which shareholders can or would obtain guidance from management about the situation, does that differ?

A. Well, if I understand your question, Mr. McKay, in the merger situation typically the management in this case the acquired company, let's say as analogized, the target company, that management has examined very carefully the proposed merger. Typically the management and Board of Directors of that acquired company has employed outside experts that deemed it appropriate to advise it as to whether or not the proposed merger terms or ratio of securities between the two companies was fair and reasonable, and hopefull [233] the best available. Quite frequently the Board of Directors of the acquired company will engage a skillful investment banking firm to appraise the prospectus of both companies and the prospective market for the shares and advise it as to the fairness of the proposal. And typically, the shareholder of the acquired company is in a position to obtain the advice of the management and Board of Directors of his company as to whether or not this is something he should favor or disfavor together with analogies of the reason why this is a good merger, one that his vote is recommended in favor of. That is also true where you have a sale of all the assets of a company which is another method of merger.

In the case of a proxy contest, of course, you have all kinds of advice being given to the shareholder as to how he should vote and why and what kind of people he's voting for or his vote is requested for in the way of directors.

In the case of an exchange offer of securities, typically there is a substantial period during which the bidder must remain on file with the SEC, their registration statement containing very substantial disclosures about the bidders, his record of operation, record of its management and ample opportunity for the management and Board of Directors [234] of the target company to appraise that situation and advise the stockholders how they should react.

In the cash tender offer under the Williams Act, the management and Board of Directors of the target company have the same obligations, if you will, towards their shareholders but it is more difficult, substantially more difficult for that Board of Directors to react and to appraise the situation carefully to determine whether or not the tender offer of cash is one which should be accepted or one which—as to which they have no opinion or one which they deem inappropriate and undervalued. The problem is that since surprise is a major element of a tender offer under the Williams Act, previously, the target company has to get its Board of Directors together. That may take several days as a minimum. The Board is scattered through some several states. The Board of Directors has to get what information it can about the tender offer from the limited disclosures in the Williams Act and the Board is under severe difficulty in trying to retain adequate outside advice from skillful investment bankers as to whether or not in their judgment this tender offer is full and adequate or

whether or not it's undervalued. That puts an enormous pressure on the investment bankers, [235] if they are to be able to act within the limited periods of the tender offer.

So the relationship is the same, the obligations are the same, the difficulty of executing those obligations are severe.

Q. Looking at the situation of a cash tender offer from a shareholder's viewpoint, Mr. Wheat, what alternatives does he have? What problems does he have with each of those alternatives?

A. Well, if a tender offer is for all of the shares—

Q. First, let's talk about the tender offer for all of the shares then separately, if you would. Tell me whether there are any differences in the case of a situation where the offer is for less than all the shares.

A. Well, if a tender offer is for all of the shares he has a choice of accepting it, rejecting it. Occasionally, he has the choice of accepting it in part, rejecting it in part. And he has the choice of acting within fairly soon after he receives the offer or trying to wait until the end of the line. And the more sophisticated he is the longer he will wait. If it's a tender offer for let's say fifty-one percent of the outstanding stock, usually there is, [236] under the Williams Act, a period of time during which if he tenders and more shares are tendered within that period of time than the shares which have been asked for by the tender, he would be prorated with those shares. If he waits until after that period which under the law is ten days then he is obligated to a first-come, first-serve basis and his shares may or may not be accepted. So that there is more pressure for

him to act more swiftly if he wishes to accept and receive the tender price.

Again, he has the choice of rejecting the tender offer.

Q. If the offer is for less than all of the shares, does the shareholder have a particular interest in that situation, in ascertaining all the facts he can about the nature and history of the offeror?

A. Well, he has that interest in a sense in both types.

Q. Is it more so in this latter case?

A. If he is of the opinion that the price offered is insufficient and the value of his shares is higher than the tender price offered and if his tax situation is such that he is not happy with the idea of going into the taxable capital gains situation which if he sells his shares on that basis he will have [237] to pay a capital gains tax which depending on his—under these circumstances at present could be as high as forty-five or fifty percent of his gain, he is interested in determining whether or not if he stays with the company and does not accept the tender offer, what sort of a management is taking over this company, what's the record of these fellows who are tendering. What is the likelihood that the company will be as well-managed or managed in a less satisfactory fashion than has been true in the past?

If the tender is for less than, let's say, fifty-one percent of the stock he has an even greater interest in that information because of the chance that even though he tenders all of his stock only a portion of that will be taken up by the bidder and he will have to remain a stockholder of that company, so his interest in whether or not he should hold or tender or whether or not there is any other alternative that might come along is in a sense greater.

Q. You referred to a fifty-one percent situation. Would the same be true as to say a forty percent situation?

A. Even more so.

Q. Mr. Wheat, prior to the adoption of the Williams Act in mid-'68, what was the situation [238] insofar as regulations on cash tender offers as compares with regulations of other methods of acquisition?

A. Well, there was an absence of regulation on cash tender offers and substantial regulation of the other methods of acquiring control of a corporation.

Q. And this was—the latter was true under the various federal securities acts, essentially?

A. That is correct.

Q. You were a member of the Securities—

A. Let me add to that that I thought Mr. Bartell described that situation very well yesterday. He did indicate that, of course, as to phases of the cash tender offer, the antifraud provisions of the Federal Securities Act did apply but as to regulation in the sense of administrative regulation there was none.

Q. Were you a member of the Securities and Exchange Commission at the time the Williams Act was passed and just prior to that?

A. Yes.

Q. And did you in that connection give some consideration to the Act in its proposed form?

A. Yes.

Q. What problems, sir, at that time was the—as viewed from the Securities and Exchange Commission's viewpoint which you then occupied, what problems was [239] the Williams Act seeking to deal with, essentially?

A. Well, the Williams Act sought to deal with this absence of regulation by providing at least a minimal amount of disclosure, requiring it. By modifying the potential for what Mr. Bartell described as blitzkrieg tactics, yesterday, by providing at least a minimal period by which the tender —the shareholder could withdraw or if something better came along during that minimal period, which was several days, by providing a period after which he could withdraw if the matter dragged on and was not pursued. By providing a most favorite nation position, you might say, to the effect that if the tenderor raised his bid, the shareholder, usually the less sophisticated shareholder would tender early, would get the advantage of the higher bid which he did not have prior to the Williams Act. And by providing that there was a minimal period during which proration would occur in the event of a partial bid.

Q. Why was it felt necessary to provide for further disclosure by law at that time with respect to cash tender offers?

A. Well, for the general reason that prior to the time there had been essentially no disclosure requirement and it was felt by the sponsors of the [240] legislation that some disclosure was desirable.

Q. Were there any historical facts or reasons brought to your attention at that time as to why federal action was needed, the excesses or situations which required specific rectification by those—

A. We were familiar with a number of instances in which, what Mr. Bartell referred to and what has been typically referred to as blitzkrieg tactics had occurred and been successful. And quite often the party engaged in those

tactics, in our judgment, was not necessarily one of the, let's say, best managed companies in the country. We thought that a minimal period at least of prenotification at least to us to review those disclosures was necessary. We sought such provision under the Williams Act and the sponsors for the legislation did not provide it.

* * *

[241] * * *

Q. (By Mr. McKay) Mr. Wheat, the Williams Act set out to give any new rights to offerors they didn't have before that Act?

A. Rights to offerors?

Q. Yes, sir.

A. No.

Q. Was the Act intended in any way, as you saw it from the SEC vantage point, to encourage tenderors?

A. No.

Q. Was the Williams Act regarded by you, from the SEC vantage point, as being a full solution to the problems you have described that existed before that Act?

A. Well, the Williams Acts was a Congressional reaction to a situation which had arisen. It was a first step, I think. I certainly did not at the time consider it to be a final solution. I'm not sure anybody did.

Q. Did it in any event solve the problems which you have described it undertook to deal with?

A. In my judgment, it did not.

[242] Q. What did it do as far as dealing with those problems, in general?

A. Well, as I have already testified, it provided certain regulation relating to rights of withdrawal, parition (phonetic spelling) and offering to all shareholders the benefit of a raised bid, and it provided minimal disclosures.

Q. Did it require a certain filing with the SEC?

A. Yes.

Q. Are the materials which are filed with the SEC under the Williams Act reviewed by the SEC prior to the effective time of the tender offer?

A. No.

Q. How does this compare with the situation with respect to registration statements and matters filed in connection with proxy fights and so forth?

A. If you have a registration statement at present, proxy statement which is part of that registration statement in connection with a merger or a sale of assets, that's reviewed carefully by the SEC before it is permitted to become effective. Proxy contest situation, there is some review by the SEC of the proxy materials.

In some instances, that review takes [243] place after the proxy materials have been forwarded to shareholders if you were in the midst of the contest. *At the outset of the contest, there is prior review. In the tender offer situation, there is no review.*

Q. Mr. Wheat, in general terms, what do the state corporate takeover statutes do that goes beyond the Williams Act?

A. Well, they do four general things. First of all, they require larger, longer period of time during which the tender offer must be publicized and open, which permits the management and Board of Directors of the target company to react, to obtain advice and information and to get that information out to stockholders. It also permits

the introduction into the bidding of additional bids. They require additional disclosure, doing beyond those required by the Williams Act, primarily disclosures which would give further information to the shareholder about the financial record and other record of the bidding company. You have a better idea what kind of an outfit it is.

They introduce the administrative process to the picture by requiring an administrative review at the state level prior to the time the tender offer itself becomes effective and is transmitted in official form to shareholders, either by advertisement [244] or directly, and they include, most of them include a provision which, in essence, requires all shareholders of the target company to be treated equally.

Q. Would you elaborate on that?

A. Which?

THE COURT: The latter.

Q. (By Mr. McKay) Take the latter one, first.

A. Well, under the Williams Act, *it is possible to make a tender offer which goes only to certain shareholders.* Let's say it *omits the shareholders in a given state or states.* That is not the way I would interpret the requirements of these state laws that I mentioned which require certain—*all shareholders be treated equally.*

In addition to that, there is an unsettled point under the state statutes. Under the Williams Act, the administrative construction has been that it is possible and not in violation of the Act for the ordinary shareholder to be paid the tender price, but for the shareholder who is an arbitrager and who has bought up the shares usually during the tender period with a view to tendering them at the close of the tender period to receive not only the tender price but also

the special commission to dealers, which is quite typically sixty cents a share, [245] thereby obtaining the larger price, in a sense. I don't know a decision in the state laws which has held that that's in violation of the requirement that all shareholders must be treated equally, but I would be surprised if that issue were not raised, and I would be surprised if it — that situation would be permitted to continue.

Q. Yesterday Mr. Bartell testified, and I believe you heard him, that one of the advantages of the state Acts, as he saw it, was the fact that more time was afforded to shareholders. Do you share his view that that is a desirable aspect of the state statutes?

A. Yes, I do, both from the standpoint of affording more time to the shareholder to think about what he wants to do and to obtain advice from his broker or from his financial adviser as to whether or not he should tender all or part of his shares or should hold on to them, and a factor there, of course, is to obtain advice from his tax adviser because the cash tender is invariably a taxable transaction; whereas, the other method of changing control, particularly if they involve an exchange of voting stock, acquire typically tax-free transactions.

So they do not involve the shareholder [246] in the problem of having to pay additional taxes and how that fits into his taxable—his tax scheme, if you will. So there are these matters which a shareholder ought to have enough time to react to, and quite often, in the blitzkrieg tactics, he does not have that time. In addition, I think it's even more important that there be an opportunity for the Board of Directors of the target company to react in a consid-

ered way. Too often in the blitzkrieg type tender offer or the tender offer which is not subject, for one reason or another, to the state statutes that extent to time, the Board of Directors reacts in a knee-jerk fashion. It just says, what do you guys in the management want us to do, and, of course, the management particularly doesn't like the tender offer because it's liable to be replaced. So the Board, without adequate information or opportunity to obtain advice from skillful people in the financial community about the—about what the shareholders are likely to be able to get reacts in a ill-considered fashion.

If there is some more time, the Board of Directors can and should review the tender offer carefully, obtain adequate advice and react in a calm and deliberate fashion as to whether or not this tender is in the best interest of the stockholders or [247] not.

Actually, I think one of the problems with the cash tender offer is that it diminishes the opportunity for a Board of Directors to advise the stockholders, which is one of the important roles of a Board of Directors and is fully implemented and utilized in the merger situation where the Board has a chance to negotiate for the merger ratio, obtain the best that it can for the shareholders and then advise the shareholders as to its recommendation. What this does is to involve two sophisticated and competent groups of businessmen in a negotiation, which usually produces a good result. The Board of Directors of the acquired company and the management and/or Board of Directors of the acquiring company negotiating at arms-length for the best deal each of them can obtain.

One of the problems with a cash tender offer is that it diminishes, if not eliminates, that opportunity for negotiation, and, therefore, you have the unsophisticated individual shareholders of the target company faced with a carefully prepared cash tender offer developed by a very sophisticated management.

Q. Do you feel that the additional disclosure, [248] which is one of the areas where you mentioned the state statutes went beyond the Williams Act, that that is a desirable thing?

A. My own opinion is that some additional disclosure beyond what is currently mandated by the Williams Act and the SEC would be desirable, particularly in the case of the tender offer for less than all shares because there it is critical to the shareholders to know something more about the outfit which is going to take over what is a majority control of his company under circumstances where it is likely that he will remain a shareholder.

In a sense, in that circumstance, the shareholder faced with a tender offer is in a position of casting a vote for a majority of the Board of Directors of his company because if he tenders his shares and the tender offer is successful and a part of his shares are taken up, since enough shares are tendered to meet the requirements of the tendering company, a change in the Board of Directors will occur, and new management, in the sense of a new Board of Directors, will take over.

It has long been thought that in a case which the shareholders asked to vote upon a change in the control or upon a director situation, vote [249] for directors, he should have substantial information before he votes.

Q. What about the—

A. I would—Excuse me.

Q. Excuse me, sir.

A. I want to add to that question. I am not satisfied that as much disclosure is required as is apparently required under some of the state statutes. In other words, I think it's entirely reasonable to conclude that some of them go too far.

Q. What about the administrative review which exists under the state statutes you mentioned as a change in addition beyond the Williams Act, do you see that as a desirable change?

A. I think some administrative review is desirable. In the absence of administrative review, you're simply relegated to courts. Everybody is suing everybody else, claiming that the disclosures are inadequate, and the courts in this country are adequately burdened as it is.

The administrative review process has worked very well in the case of other aspects of the securities transactions and the securities markets, and what the state statutes have done is to introduce an element of administrative review of the disclosures, [250] which was not present.

Q. You mentioned the four respects in which, generally speaking, the state statutes do things which goes beyond the Williams Act. Do you regard these as essentially supplements to the procedures set forth in the Williams Act?

A. That is the effect of the state statutes because the Williams Act is in operation, and the state statutes add these additional elements, not otherwise present.

Q. Are you aware of any situation in which compliance with the state statutes would make compliance with the Williams Act impossible?

A. I don't know of any such situation. It would surprise me if that occurred. If there is some aspect of the Williams Act which, for some reason, cannot be implemented because of a state statute, I think a conference with the Administrator of that particular state would swiftly dispel that problem.

Q. Mr. Wheat, do the state statutes in any way prevent tender offers?

A. No, they do not.

Q. What effect does a tender offer—I'm switching gears now. What effect does a tender offer made under the Williams Act have on the market?

[251] A. Well, the effect of a successful tender offer under the Williams Act or any other Act or, for that matter, in the absence of regulation, typically reduces the quality of the market for the securities.

Quite typically, if you have a successful tender offer for fifty-one percent or sixty percent or what have you of a stock of a company listed on the New York Stock Exchange, the remaining round lots and distribution of shares after the acquisition of that block, that controlling block, may not be adequate to meet the standards for the market on the New York Stock Exchange.

These shares are delisted from that market and are relegated to the over-the-counter market If the tender offer is for shares that are traded on the over-the-counter market, the remaining shares and the remaining number of shareholders may be insufficient to qualify for the national list of the NASD, and you are relegated to local lists and less market information provided by fewer publications, and, of course, in every one of these instances, a market with less depth and liquidity because there are

fewer trades and transactions because there are fewer shares in the float. So successful tender offers result in the diminution of the market.

[252] Q. Do the state statutes, state takeover statutes have any effect on that situation?

A. Well, I don't think they affect that situation because a successful tender offer under the state statutes will have the same impact as a successful tender offer in the absence of a state statute, but in another sense, you might say they have some impact.

In any market, I think the test of a good market is a market which brings together, let's say, all potential buyers together with all potential sellers at about the same time so as to result in the best, let's say, economic price.

What the state tender offer statutes do is to extend this time period during which the management and Board of Directors of a target company, as I indicated, can react to the tender offer, and during which time, other potential bidders can take a look at the situation. They typically are surprised by this tender. There is then an opportunity for them, if they can study the matter quickly enough and determine upon whether or not to bid, to come in with a competing bid or bids.

As a result, therefore, of the extended time period, you are able to bring into the market, if you will, for this block of stock, a market for the [253] shares being tendered to you, additional bidders to match up with the shareholders who are trying to determine whether or not to sell, and as a result of that, you have a better market in that sense than you have when the bidder has an opportunity to gain complete surprise and to conclude his bid sufficiently fast that

there is really no time for competing bids to come into the picture.

Q. In this case the Plaintiff in one of its briefs has asserted that the state corporate takeover statutes operate to impede the market. Do you have a reaction to that, sir?

A. Well, I don't think that's a fair statement. A tender offer is essentially an offer outside the market, the pre-existing market for shares which is made up of persons trading for the securities in the ordinary course, and sometimes blocks being traded by larger investors, and as I indicated, the successful tender offer will diminish the quality, the depth and liquidity of the market. So I don't think it's a fair statement to say, as you indicated, that a tender offer is injurious to the market.

THE COURT: Do you agree with Mr. Bartell's testimony in substance that the takeover statutes might have a chance to [254] reduce the original offer made by the acquiring company?

THE WITNESS: Well—

THE COURT: Did you hear his testimony?

THE WITNESS: Yes, I did. Let me answer that question, perhaps, in two ways.

THE COURT: All right.

THE WITNESS: I think that state tender offer statutes, taken kind of as a whole, this group of statutes probably do have a deterrent effect of a sort upon the initiation of some tender offer. I don't think there is any question about that. They will deter, particularly the blitzkrieg artist, if you will, who is interested only in a tender offer if his—if he's able to do it with surprise, swiftness and essentially making it difficult, if not impossible.

THE COURT: Make it a tender trap?

THE WITNESS: For—That's a good way to put it. For competing to come in. Ordinarily, if a—the state statues, I think have a tendency to, if you will, by the requirement of additional time, bring into that picture additional bids assuming [255] that the tender—original tender offer is at, let's say, a bargain price, one which is really not in the best interest of the shareholders who are on the receiving end, and in that sense, it enhances the likelihood of tender offers and additional tenders in situations where an initial tender offer has been made.

[272] • • •

Q. I didn't understand you earlier. You are not opining that cash tender offers should be discouraged [273] are you, in the context of American economics?

A. Most definitely not. I think the cash tender offer is a very legitimate business procedure which has its—has its place and of course, regulations should be such as to protect the best interest of the stockholders of those potential target companies.

Q. The point I'm making is that there—at least when we characterize not an infrequent number of instances, there is very little surprise involved because the company has previously identified itself as a target, whether or not it elects to take offensive steps itself, at least it identified itself as a potential target?

A. Yes. If the company is smart enough to have identified itself as a target then the tender offer may come as no surprise.

[274] Q And then as a result of the many and various defense tactics that are available after a tender offer is made, isn't it a fact that the time constraint or the minimum times specified in the Williams Act are very rarely, very rarely actually utilized? Perhaps that's not clear.

A No, I understand it, counsel, I think, and I think you are correct. I think on the average the tender periods under the longer, in some cases significantly longer than the minimum periods which are permissible under the Williams Act. Certainly if you're dealing with a sophisticated management of a target company which has previously identified itself as a potential target and has taken these precautionary steps to deal with the tender when it comes and it will come as a surprise in a sense because even though you may expect a tender you have no advance notice under the Williams Act as to when it's going to happen. So, your preparations are necessarily coent (sic) to that extent.

Nevertheless, under those circumstances it's impracticable to make a tender offer and achieve success within the minimum periods.

• • •

[281] • • •

THE COURT: Is there a sense of loyalty between shareholders and management that the tender offeror has to overcome, in your opinion?

THE WITNESS: I would say that in some instances, yes, and in some instances it's very difficult to find that sense of loyalty. In some companies shareholders who have bought the [282] company stock, let's say, when it initially went public at a relatively higher price compared to today's price and have seen their shares multiply in value and have a strong sense of—that the company's management has done an awfully good job for them will have a loyalty to that management which at least will

translate into a serious question as to whether or not they want these fellows from New York to take over this company.

THE COURT: Better use another state.

THE WITNESS: With no reflection on any person present.

On the other hand, I would say that in many cases what a shareholder is principally interested in is the price that he's going to get and if it's substantially above the current market price and he is not persuaded that the company is about to receive a bid which is a higher bid than that or other securities which are of equal or greater value, his tendency—very strong tendency is to accept that bid and accept it as swiftly as he can.

• • •

[285] • • •

Q The Williams Act was passed in 1968, is that correct?

A Correct.

Q Do you recall when the first act was introduced or when the first bill was introduced in Congress which undertook to regulate tender offers?

A Not specifically but I believe there was one introduced as early as 1966.

Q Could have been '65?

A Could have been '65.

Q Do you recall anything at all in your tenure on the Commision about what the terms of that Act were?

A As I recall, one significant term of that Act was a twenty day prefiling period in advance of the effective date of the tender offer similar to many of the state laws and

that was ultimately rejected by the sponsors of the Williams Act.

Q The committee not only rejected it but ultimately the sponsors of the Williams Act—but the committee itself did not like that at that time period, did it?

[286] A Well, the Commission recommended a five day prefiling period for review by the Commission of the disclosure materials.

[287] Q And did the commission testify before Congress concerning that—

A We did.

Q —that matter? That provision, likewise, did not find its way into the Williams Act, did it?

A Right.

• • •

[289] • • •

Q Congress, likewise, considered the extent of disclosure which would be required by an offeror under the Williams Act, did it not?

A It did.

Q And I think even went so far as to consider or at least take testimony on perhaps the advisability of requiring something similar to S-1 or registration type disclosures?

A I don't remember the—

Q Is that correct?

A —testimony that precisely.

[290] Q In any event, the commission at that time took the position that at least disclosures to that extent would not be desirable, did it not, disclosures to the extent of an F-1 or registration disclosure?

A I'm not sure that I can say that. The commission interfaced with the Williams Committee in a sense of commenting upon the value and usefulness of the proposals of the committee and any particular proposal that the commission believed to be ill-founded, but I'm not sure that I recall any discussion by the commission with the committee to the effect that disclosures going beyond what the Williams Act required were ill-advised.

Q In any event, prior—

A It was a delicate kind of relationship, if you will.

Q But I take it that, in any event, while you don't remember any specific conversations, at least prior to the passage of the Williams Act, the whole matter of disclosure was considered by Congress?

A I believe that's correct.

Q The third item was that the acts required administrative review. Is that correct? Was that the third—a third distinguishing characteristic?

A (Witness nods head.)

Q Again, do I properly understand that the [291] Securities and Exchange Commission proposed to Congress in the debates on the Williams Act that prior administrative review be afforded?

A Correct.

Q And what was rejected by Congress?

A That is correct.

Q And finally, I think the fourth general aspect you commented on was what the state acts provided that all shareholders are to be *treated equally in a* tender offer.

A Many of them do.

Q I understand then that not all the state tender offer statutes have that provision.

A Well, I couldn't tick them all off for you, but I know many of them do contain that provision.

Q In *your estimation, though, I take it the Williams Act does not so provide?*

A Correct.

Q Did I properly understand that your concern there is the fact that the arbitragers maybe allowed an additional fee for their tender of shares?

A I'm not sure that I am expressing my concern. I was simply saying that one of the things that the state statutes which contain that provision do, going beyond the Williams Act, is to provide this equal treatment [292] of shareholders. Whether good or bad, they do that, and one feature of the administration of the Williams Act appears to me to permit this fee to be paid to those shareholders who have been in the arbitrage function, and I doubt that was—would be permissible under a construction of those state statutes.

I am not intending by that to derogate from the function of the arbitragers. I think they perform a very valuable and useful function in the markets, and in the tender offer area, a particularly valuable and useful function. So I am not qualitatively assessing this question. I am merely pointing what I believe these state statutes do beyond the Williams Act.

• • •

[295] • • •

Q The Congress in passing the Williams Act did seek to achieve and did at least say that it was seeking to

achieve a balanced treatment between the offeror and the target, the incumbent management, did it not?

A At the time of the adoption of the Williams Act, Senator Williams certainly did say that, and I'm sure that that was his genuine objective.

Q And you wouldn't disagree with that as a policy, would you?

A I think it's an admirable policy, but I would say that because wisdom comes late is not necessarily a good reason to deny it.

Q That is, you disagree even though Congress [296] determined that it was following a balanced course, you disagree with that?

A I certainly do.

Q You are aware, are you not, that Congress has considered many of these same matters that it rejected in the course of passing the Williams Act very recently are you not?

A Well, I am aware of the fact that in the context of the gigantic mass of amendments to the securities laws recently adopted by the Congress, there are primarily focused on the mechanism for instituting a so called national securities market.

There were various amendments, some of which affected sections 13 and 14 of the exchange act. I'm not sure how closely the Congress focused upon changes in the basic structure of the Williams Act in the course of that examination, but I would say they generally focused upon the higher panopaly of the securities act.

Q Are you familiar with what is known as the Hart-Scott-Rodino Act?

A I am.

Q And in that act, correct me if I'm wrong, there is a provision that in the case of tender offers, there will be a longer delay between the making of the actual offer and its consummation than is presently provided for [297] in the Williams Act, give a chance for an anti trust review. Is that correct?

A That is correct in the case of companies with an excess of a million dollars of—Is is sales or assets? I can't remember which—acquiring companies in the ten million dollar range. I believe a fifteen day minimum period is required, and the Justice Department has authority automatically to extend that to twenty-five days.

Q All right, and that is a waiting period, though, between the time that the offer is made and the time it can be consummated. Am I correct? It's not a preclearance—

A I'm not sure, but what—if you were subject to one of these state statutes that requires a prenotification prior to the time the offer can be made, I would think it would be possible to give your notification to the justice department, start that period running sometime prior to the time they actually make the offer, but I'm not sure of that point.

Q All right, but insofar as the Federal Government and Federal regulation is concerned, the Hart-Scott-Rodino Act still does not provide for a prenotification administrative review?

A I don't think that's required at all.

[303] • • •

Q. You mentioned in direct, earlier today, that the State Takeover Acts in your opinion do not prevent takeovers.

A. Correct.

Q. They could conceivably, could they not?

A. Well, I suppose it's conceivable that a takeover which was in violation of the state statute which was held to be applicable and which was enjoined by that state's courts for that reason, could thereby be prevented.

Q. All right. So a state could conceivably prevent a takeover that in all respects complied with the Williams Act?

A. Yes, that is entirely possible simply because of the differences between the state—the particular [304] applicable state law and the Williams Act.

Q. You are aware, are you not, that there is at least a body of opinion which I think Mr. Bartell discussed some, to the effect that the State Takeover Acts have some discouraging effects upon tender offers.

A. I am aware of that opinion.

Q. That's simply an opinion with which you personally do not agree?

A. Oh, I testified this morning that I believe that it is true that the State statutes, as they presently appear, do in fact have a tendency to defer some tender offers. And part of the reason for that is the—the differences, the kind of mixtures of differences in the state stautes and I would therefore applaud the efforts of Mr. Bartell and other State Commissioners to achieve uniformity as a very desirable objective among the state statutes. Such efforts are in progress.

Q. If there were no state statutes, are you informed that regulation of tender offers would have been achieved by the Williams Act?

A. That's correct, subject to the proposition of course, that in our federal system there is a substantial place reserved for the states and for state law enforcement and

it's entirely possible that a sleepy [305] federal bureaucracy could fail to act in a given tender offer whereas the state, with a nexus with that tender offer could find a violation of its general antifraud provision of its state laws and enjoin the offer. So total uniformity is not achieved in our federal system.

Q. In that sense, that uniformity may never be achieved?

A. That is entirely correct and may be desirable.

Q. I was a little confused about your discussion this morning concerning the market effects of both takeovers and of the State Takeover Acts themselves. I understood you to say that the State Takeover Acts have an impact on the market which is a good impact by virtue of the fact that they extend the time within which the parties may look at these offers. But, I'm confused as to how they—what good effect it has on the market.

A. Well, I was really talking, Counsel, about two related markets. First of all, there is the general trading market for the securities of the target company and that market will, of course, react to a takeover bid. But, for practical purposes that takeover bid is an unusual event outside the regular trading markets. That bid does not go right to the [306] market and start buying up shares, it's something which is even under the Williams Act takes some time. On the other hand, there is another sense in which this matter affects the market and that is the market for a major block, a controlling block if you will, of a company. It's very difficult to buy a controlling block in the ordinary trading market because, as you go in and try to buy shares, the buying power will drive the price up to a point at which it becomes uneconomical to continue to buy shares. So it's

difficult to use the usual trading market to acquire a block which will give you control of most markets. Ordinarily a tender offer is made and ordinarily swiftly and outside the trading market—of the normal market to acquire this controlling block. Now, what I was trying to say was that in order to achieve what is generally referred to as a good market for anything you want to try to bring together those people who are in a buying phase who are looking to buy and those people who are looking to sell and here you have a controlling block that you're talking about. And if under the Williams Act, for example, a bidder can ram through swiftly a tender offer before there is an opportunity to bring into that market for that controlling block other potential bidders who may be [307] very much interested, but who obviously take a little while to gear up and have a look at the situation, then you do not have a good market because you have by definition failed to bring together those who are or have an interest in buying to those who have an interest in selling. To that extent and in that limited context, the state tender offer statutes provide a better market.

• • •

[309] • • •

Q. You say that the state takeover statutes have in your opinion many defects. Would you tell us what defects you see in the state tender offer—state takeover statutes other than what you've already testified to?

A. Well, let my try to be rather general about that.

I'm very doubtful about the desirability of a provision that permits the target company at will to obtain a hearing. I would much prefer to have the Administrator of the state

statute have discretion to call a meeting if he or she deems it necessary to have a hearing on the disclosures. So I would oppose that feature of the state statutes. As I indicated to you, the jury is out with me on prenotification. I [310] haven't really made up my mind as to whether that is something than can be tolerated in light of the benefit of a longer period or whether in an ideal state statute or federal statute for that matter, if the federal statute could be amended, a longer period should be provided commencing with the date of the surprise and the notification of the tender offer. And that's a very debatable point and my inclination is to believe that the best solution would be to have that longer period commence with the announcement of the actual tender offer with a substantial period during which no one would feel or be under pressure to tender, as is the case today.

I have doubts as I previously indicated as to some of the disclosure requirements of some of the statutes. Some of the statutes don't have disclosure requirements and some of them do and they are very extensive. I'm inclined to think that the ones that have none have not gone far enough to counter the defect in the Williams Act and others have gone too far in requiring a massive mass of disclosure comparable to Form S-1 which I don't think is desirable or necessary.

• • •

[313] Q. Mr. Wheat, we've talked obviously at great length now both on your direct and cross about the matter of time, whether it's pre-offer time or post-offer time, you're not prepared to say which is the better, but you believe that there ought to be more time.

Of course, the Williams Act provides for no pre-offer clearance and potential time period of seven to ten days. State tender offer statutes provide for twenty day waiting periods or waiting periods plus hearings and the like; is that correct?

A. And for the post-offer time periods in a number of instances.

Q. How much time is necessary in your estimation?

A. Well, I would preface my comment by saying that there are probably others whose judgment on this subject would be better than mine but based on my own experience I would say a period of thirty days would be about the right balance. And I would like to see no shareholder under a money pressure to accept and turn over his shares before that period is ended.

Q. Mr. Wheat, the record will show Great Western first met with Sunshine board of directors on March 18, that on March 21 it announced the possibility of a tender offer.

[314] The record will further show that as of today's date the Sunshine board of directors has not made any recommendation of any kind of Sunshine shareholders.

Since there have been two months or a little bit better, is that enough?

A Well—

THE COURT: You said thirty days?

THE WITNESS: I said thirty days was my judgment, a good balance. I can't comment on the particular specifics of this case. I would assume that to some degree one might guess that the failure of the Sunshine board to act has been delayed by the progress of this litigation.

* * *

Transcript of trial proceedings:
Testimony of William E. Chatlos, witness on behalf of Defendant Idaho officials—Direct examination

Cross examination at p. 373

[319] * * *

DIRECT EXAMINATION

BY MR. McKAY:

Q Would you state your name, sir?

A William E. Chatlos (spelling) C-h-a-t-l-o-s.

Q Address?

A 165 Grandview Avenue, North Caldwell, New Jersey.

Q What is your occupation?

A I'm a principal of the firm of Georgeson and Company.

Q Would you spell that?

A George-son, one word.

Q And what does Georgeson—is that how you pronounce it, Georgeson?

A Well, the gentleman died in 1945 so I'm not sure.

Q What does Georgeson and Company do?

A We specialize in the relationship between publicly owned companies and their owners.

[320] Our business is generally broken down into two areas; the solicitation of proxies in which we are the largest firm. In 1976 we solicited for 450 campaigns including fifty tender offers which included thirteen exchange offers and the remainder, cash offers, half of which were hostile. The other side of our activity includes the management of corporations and their investor relations activity in which area I am in charge.

[321] Q. What services does Georgeson and Company provide with respect to tender offers?

A. We have represented both offerors and targets both as to advanced planning and as to the sudden, hostile offers.

THE COURT: You are one of those companies Mr. Wheat testified about?

THE WITNESS: I suspect so, sir.

THE COURT: All right. Thank you very much.

Q. (By Mr. McKay) What are your personal responsibilities and functions at Georgeson, sir?

A. As I have indicated, I am in charge of the consulting activity, and this relates to the investor relations, programs and activities that Mr. Wheat referred to that we sometime put on on behalf of corporations, and in addition, we work with any special activities within the corporate domain, including takeovers.

Q. Have you done any writing, Mr. Chatlos, for publication?

A. Yes, sir, over the years, there have been a number of articles written ranging from investor relations practices to takeover activities. I run surveys on takeovers, and also we run—I'm sorry. I [322] meant to say seminars on the takeover activity.

Q. Have you had publication in any particular journals?

A. Well, I suppose within the last couple of months, my views have been expressed in the *New York Times, Dun's Review. Public Opinion Quarterly* has written a couple of things, yes, sir.

Q. Have you done any teaching, sir?

A. I have been a guest lecturer at a number of colleges.

Q. Would you mention a few of those?

A. The Harvard Business School, Columbia University, others.

Q. Do you belong to any societies or organizations which relate to your professional activity?

A. I was a founder, past president and director of the National Investor Relations Institute which is a group of professionals in this field who gathered for further educational advancement. I am a member of the AMA, Public Relations Society of America and have been on various special consulting groups in those areas.

Q. Have you personally, Mr. Chatlos, had any involvement with the enactment or consideration of State Takeover Statutes?

[323] A. Yes, I have appeared as witness in two states and have been consulted in maybe ten or more other states.

Q. Is Georgeson and Company retained by Sunshine Mining Company in connection with the proposed Great Western tender offer?

A. Yes, sir, I understand that it is.

Q. Do you personally have anything to do with that retainer?

A. No, I know nothing whatever about it other than it is in the house somewhere. As I mentioned with four hundred fifty campaigns a year, these things are allocated and —except for knowing it's in the house, I don't know anything about what's going on.

Q. Mr. Chatlos, have you made any analyses of various facts with respect to hostile tender offers in recent years, you or Georgeson?

A. Yes. Actually, this was occasioned by the proposals that came out of the SEC last September. These proposals

suggested certain alterations of the rules, and, frankly, I did what I thought the SEC certainly did, but found that I was wrong and certainly should have done before proceeding with those proposals. I took those proposals and applied them to past history, the net result being that in the absence of state laws [324] and on the basis of current SEC law and even the proposals made last September, if the SEC law alone prevailed in the last two years alone, stockholders would have been deprived of something in excess of a hundred fifty million dollars that incrementally accrued because of takeovers.

• • •

[331] • • •

Q. There was also discussion, which I believe you heard, with respect to the proposition that where a management of a company had identified itself as a possible target—

A. Yeah.

Q. —for a tender offer, that thereupon, it had a position of advantage. Do you have any knowledge on that subject, sir?

A. Well, the record doesn't indicate—does not [332] indicate any advantage at all. While it may be from an academic point of view advantage to realize ahead of time that you might be susceptible, the fact of the matter is that what I call the corporate karate syndrome applies here. I've used that term for a number of years, corporate karate sort of being a hopefully a cute way of saying that the very strengths that make a company susceptible rebound to its exact weakness in trying to defend.

Let me explain that, if I may. Prudent corporations operate in a rather meticulous way. Decisions are not made

easily. They don't shoot from the hip. They don't react in an instantaneous way. The corporations accumulate information, weigh information, evaluate, maybe run a test run, have committees look at it and maybe have some pilot models made out of it.

THE COURT: Sounds like the Government.

THE WITNESS: And eventually make a decision, rightly or wrongly, a decision is made.

Interestingly enough, this is the way the offeror creates its own activities. Under cover of night, it takes as much time as it likes in a secret way to develop [333] information, weigh it, determine its best timing, determine its best strategy, and then a corporation on a surprise, sudden, emotional basis—panic may also be an applicable word here—is suddenly faced with a decision-making capacity totally foreign to its years and years of experience.

It's completely unprecedented that it should have to make a decision of this magnitude shooting strictly from the hip, so to speak. There is no time to create information. There is no time to weigh it. There is no time to call Board meetings.

As a matter of fact, one of the booby traps that we find as Mr. Wheat said when we go in and try to help companies, if you have a—and many companies do—if you have a condition that a Board meeting cannot be called except with five days notice, sometimes a week notice, what do you do if you get an eight-day blitzkrieg?

You really can't even call a Board meeting without problems to those Board members because of official notice requirements, et cetera.

[334] So it is very, very difficult, and any corporation has been under extreme stress to react under a short

period of time under most difficult conditions, even if it anticipates ahead of time that it might be susceptible.

Q. (By Mr. McKay) Mr. Chatlos, you've told us that the frequency of success of target companies in remaining independent, according to your studies, does not seem to have been effective one way or the other by state statutes except that you assume that, logically, the success is greater under state statutes because there are some restrictions there. Is that what you said, roughly?

A. I didn't analyze it from that basis. I believe that's true.

Q. You regard it essentially as not a significant factor on the degree of success?

A. Well, if you assume eighteen to be the number, you have a percentage figure of three out of eighteen in 1976. That's not a very good factor record for those of us who sell a service trying to defend corporations in that regard.

Q. Well, if there is not much benefit in the state statutes, from that respect, in other words, it [335] doesn't matter too much as far as retaining independence in your judgment, what, if anything, is the benefit from the state statute, vis-a-vis shareholders, vis-a-vis the company?

A. Well, I believe I indicated earlier, the sole benefit that we were able to develop was the increments developed as a result of competitive activity within the corporate market place in assessing truer value of the target company. May I elaborate on that?

Q. Please.

A. The —

Q. First of all, let me understand. Are you saying, in essence, the shareholders get more money?

A. Much more money.

Q. All right. Now, please elaborate.

A. And it is a matter of the survey and the record which anyone can look at. The problem, really, involved here is that takeovers are basically an economic opportunity, and only economic opportunists participate. The object, and we have represented these people. The object is to buy something as cheaply as you can and as fast as you can and get away as quickly as you can before somebody else smells what the game is about and can join in and throw another bid into [336] the pot.

The net result is that, obviously, the shorter tender period, and more opportunity for success for the original offeror. We must look at the economic balance that we find here because these ambitious people have existed in all of the time I have been in on Wall Street, at least. So there is no change in that.

The change, really, is in the economic elements. I mentioned that in 1970, '71, '72, there were very few offers. This was not because there was a lack of ambitious people. This was because the price earnings ratios were very low, and you may remember, we had a cash crunch.

The economic capability of success was simply not available. Today we have almost pure, almost perfect economic guidlines.

While PER's still remain low, and that's the one outstanding negative feature, the cash is readily available, and the market place is ideally suited to being raided.

I might go on with that. Mr. Wheat, I think, referred to the fact that the shareholder has abandoned the market place.

To that extent, the financial community, [337] the SEC, indeed, must take responsibility for driving the share-

holder out of the market place. The SEC, indeed, encouraged the rise of the institutions with a net result that today we have very few individuals in the market place and a follow-the-sheep syndrome of the major institutions in following what's been termed the nifty-fifty, the net result being that most stocks, not only on the over-the-counters, Mr. Wheat said, but including the New York Stock Exchange, most stocks are characterized by one single factor, which I believe proves the points I'm just trying to make, which is a thin trading volume.

There's nobody buying or selling. The individuals are out of the market, and the institutions either won't or can't take an interest.

So the net result is the market simply drifts off and bears less and less reflection to true underlying worth than probably ever in the history of the stock market.

There is the beautiful economic opportunity for the sudden, surprise, hostile raid, get in and get out quickly to steal something.

The concern here is what about the stockholders? The country as a whole is most concerned about a capital gap, capital formation gap, and [338] at the same time, we have driven the individuals out of the market place, and now we are seeking to deprive the individuals as much as possible of the differential between an ineffective market and true value, and then we wonder why the individuals don't come back into the market place. The reason is rather clear. They are not stupid.

We must find a means to pay attention—

MR. IRWIN: Your Honor, I am just going to ask that a question be asked rather than just a continuing narrative. I never know where it's going.

THE COURT: Well, I don't either, but it's interesting.

MR. IRWIN: Oh, it is interesting.

THE WITNESS: I will conclude, sir. I'm sorry.

MR. IRWIN: I quite agree.

THE COURT: He's concluded.

MR. IRWIN: I just wish we could get a question asked occasionally.

THE WITNESS: If I may, I will just conclude with one sentence. The only way this was going was to indicate the economic opportunity available to those who wish to [339] avail themselves of it. Prices are low. The values are high. Cash is ready. Anybody who wishes to take opportunity of this is liable to gain. It's a wide open game with the exception of the state laws.

Q. (By Mr. McKay) The state laws play a significant role, as you see it, in controlling this situation, minimizing problems or what?

A. The only control that I can see is involved in the state laws.

Q. And would you elaborate on how the state laws help the situation or alleviate problems?

A. Simply—Well, on the basis of what I have previously said, if we go on the premise that we do not have an efficient market place, and we have companies selling at thirty, forty, fifty percent of conservative book, if we go on that premise, then we have to assume that the market place is inaccurate and the only competitive market place we then have is the corporate auction market in which, through the state laws, corporations have the time, and bear in mind what I said earlier, have the time through prudent, practical, reasonable procedures to accumulate information, weigh and assess it, do their job, and then per-

haps on a prudent basis, they can enter into [340] bidding process.

Now, most corporations would not be ungentlemanly enough to make the initial hostile raid. They have no compunctions about becoming an angel, so that an auction process, indeed, empirically does develop once a raid takes place and given sufficient time on—in a general, balanced way.

Q. Do you share then the view of Mr. Wheat and of the gentleman from Wisconsin that the time factor of the state statutes is the very significant value of them?

A. It is the single most significant value.

* * *

[373] * * *

Q —of that fact? So that without that information, without the information concerning the offeror's pricing policy and the reaction of management to the offers made, there is no way in truth and in fact, is there, to a direct connection between the existence of a state takeover statute, on the one hand, and a resultant higher price, on the other?

A In general, I don't think that follows. I could go over the entire list, but I will not. In general, [374] what this shows is that those offers that lasted sixteen days or more resulted in a total net premium to stockholders of over a hundred forty-one—if I reduce it to ten, over a hundred fifty million dollars than the short offers under fifteen days, so—which only involved—which only involved fifty-two million a hundred fifty-six thousand four hundred thirty seven dollar and fifty cents. So that the differential is that the short term offers approximate fifty million dollars in premium to stockholders. The over fifteen day offers, involved in excess of a hundred fifty million dollars in premium.

To me, what that shows is a given period of time in which a corporate auction market can develop results in higher prices for the stockholders.

Q In premium—

THE COURT: Are you taking into account the number of shares for under fifteen days and for over fifteen days?

THE WITNESS: Yes, sir, if you would like to see the form, what we tried to do was put the number of shares involved and here we even went to the company and tried to find out how many were actually tendered as opposed to simply being outstanding, multiplied by the premium that evolved over the original tender [375] price. That is where the arithmetic is out on the figures that I mentioned.

Q (By Mr. Conant) All right. Then, Mr. Chatlos, I wanted to make clear, when you speak of premium as indicated by your analysis, you were talking about premium over the original offer?

A Yes, sir.

* * *

Transcript of trial proceedings:
Testimony of Stephen Craig Metzger, witness
on behalf of Plaintiff—Direct examination

[437] * * *

Q All right. Without getting into too much detail, was there anything said about whether or not our registration would ever be approved as long as Great Western was supporting a reimbursement to Heckla Silver Dollar for these proxy expenses?

A That impression was conveyed to me in that conversation.

Q Well, I don't want to talk about impressions. What was said, as best you can recall, from Mr. Baptie to you on that subject?

A Well, as best I can recall, he kept repeating that the —that $200,000.00 arrangement looked to be a pretty clear violation of that section of the statute which would have the effect of Great Western never really being able to get their registration statement effective.

[438] Q All right. Can you recall what other subject matters, not in great detail, but just subject matters, were discussed with reference to Sections 12 through 15?

A We discussed a little bit about Washington law. There is some comment in the letter relating to the ability of controlling persons to issue additional shares or something which, as we discussed it a little bit, it sounded very prospective and in future of, and in discussing it, I really didn't understand what he was getting at, but I responded by saying something to the effect that, well, number one, there is some New York Stock Exchange rules if you're a controlling shareholder that prevent certain things and require shareholder approval for certain distributions.

THE COURT: What about his comments? That's what we're interested in.

[439] THE COURT: What about his comments though, that's what we're interested in. I'm interested in his comments that he made to you on what his course of action might be.

A. Well, as we discussed in general terms, I tried to get a handle on how we could respond.

Q. What were his comments though, what did he say about what this comment letter was going to include

A. I don't recall any other specifics other than those two.

Q. All right. Do you recall whether or not you heard any statement by Mr. Baptie in that conversation as to what our alternatives would be in terms of either complying with what he said or whatever?

A. Yes.

Q. All right. What was that?

A. Well, he was anxious for us to comply and indicated that if we were to file an amended registration statement on Monday that they would not be inclined to conduct a hearing and that they would hope that the offer could proceed very quickly. He also gave me an indication that there might be some way to cut short the hearing time or that the company might estopped after some period, some reasonable [440] period of time from asserting a right to a hearing.

Q The company, you're referring to Sunshine?

A I'm sorry, Sunshine Mining Company. As I talked with him a good bit more, because I disagreed with him on the $200,000.00 statement more than anything else, I asked him if I could send him a supplemental letter pointing out to him certain things and his response was that supplemental letters really didn't make any difference or anything. What he expected us to do was to make a compliance amendment of the full package, the full registration statement. And if in the amendment we filed we took exception to something he would just call a hearing.

Q So there was no room for negotiation, is that a fair statement?

A Yes.

Q Fully comply with comments in his letter or there would be a hearing?

A Uh-huh.

Q Now, do you recall if you reported this telephone conversation on the 24th to Mr. Boswell on that day?

A I don't think I did.

Q Did you have any discussions with Mr. Baptie on the 25th, the next day?

[441] A. I may have. There was a great deal of difficulty in getting that letter and I think I called him late in the afternoon on Thursday or maybe into the evening and the letter just never seemed to show up. And finally, at one point in the hearing on Thursday he indicated to me that it wasn't going to get out that day for some mechanical problem and that it subsequently didn't show up on Friday morning as he had said that he would try his best to do.

Somewhere in here I suggested that we had a telecopier and he just telecopy it and get it to us. And there was some mechanical problem with Graphic Scanning or something, that I still don't understand, but it resulted in us not getting the letter until late Friday and I may have talked with Mr. Baptie or his secretary or maybe even Mr. Kaufman. I talked to Mr. Kaufman in there somewhere about getting the letter.

Q. All right. Did you finally get the letter on the night or the evening of the 25th?

A. Friday, yes.

• • •